In the Supreme Court of the United States

OCTOBER TERM, 1921.

In Equity No. [redacted]298

THE STATE OF TEXAS, Appellant,

vs.

EASTERN TEXAS RAILROAD COMPANY, ET AL.,
Appellees.

Appeal from the District Court of the United States
for the Western District of Texas.

BRIEF OF APPELLANT.

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[redacted]

Solicitors for Appellant.

SUBJECT INDEX

CASES AND AUTHORITIES CITED

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Appeal from the District Court of the United States for the Western District of Texas.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

For the purpose of simplifying and correcting the statement in appellant's brief.

The Eastern Texas Railroad Company was incorporated under the general railway corporate laws of the State of Texas, November 8, 1900, and is 30.3 miles long and extends from Lufkin, in Angelina County, Texas, to Kennard in Houston County, Texas. At Lufkin it connects with the St. Louis Southwestern Railway Company of Texas and the Houston, East & West Texas Railway, besides some small lumbers roads. It was promoted and financed by individuals interested in the Texas & Louisiana Lumber Company, which lumber company owned about 116,000 acres of pine timber

lands in the vicinity of Kennard. The construction of the line of railway enabled the lumber company to build at Ratcliff, within three miles of Kennard, one of the largest saw mill plants in the south. By organizing a railway and constructing a line of road, the owner of this pine timber was able to reach the markets with its lumber and forest products and secured for the railway a division of the through rate. The other traffic in the territory was wholly insufficient to justify the construction of a railway, but it being a common carrier, it was necessary for the railway to transport such other traffic as was tendered. Upon the completion of the line of railway, it was valued by the Railroad Commission of Texas, and the company authorized to issue $454,500 capital stock as representing the value of the property. There has never been any mortgage or bonded indebtedness on the property.

In connection with the main line, there was constructed several miles of tram tracks by this company through the timber, and on August 28, 1906, the railroad company sold its tram tracks, current assets and rolling stock, all of which had a book value of $94,604.94, to the lumber company. This sale was made in contemplation of the sale of the capital stock of the railroad to the St. Louis Southwestern Railway Company, a Missouri corporation, and one of the appellees herein. The capital stock was so sold, and paid for by the St. Louis Southwestern Railway Com-

pany with its bonds, payment being on the basis of par value of the capital stock $454,500, and since such sale the officers of the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas have been practically the same, but the three companies have been operated independently. The Eastern Texas Railroad Company has twice applied to the Legislature of the State of Texas for authority to consolidate its property with the St. Louis Southwestern Railway Company of Texas, but has been unable to secure authority to do so.

In 1917, the timber of the lumber company being practically cut out, it dismantled and removed its mill plant and buildings from Ratcliff. Up to the time of the removal of this mill, the railroad company had paid operating expenses, but since that date its income has declined, so that it has had an increasing deficit. The financial condition of the country became such that on June 3, 1920, the appellee, Eastern Texas Railroad Company, made application to the Interstate Commerce Commission under the provisions of paragraphs 18, 19, 20 and 21 of Section 1 of the Act to regulate commerce, as amended by the Transportation Act of 1920, for a certificate of Public Convenience and necessity, authorizing appellee, Eastern Texas Railroad Company, to abandon the operation of said railway and dismantle and remove its entire line and dispose of the salvage. Copy of this application is con-

tained in the transcript, page 28. Thereafter, on July 19, 1920, appellant, the State of Texas, filed in the State District Court at Austin, Texas, a bill of complaint praying for an injunction enjoining the Eastern Texas Railroad Company from abandoning the operation of its trains and dismantling its road (Tr. pp. 1-7). The injunction was granted, as prayed for, by Geo. Calhoun, Judge of said State Court, on the 9th day of July, 1920 (Tr. p. 44).

Thereupon defendants in said cause, on October 4, 1920, filed a petition for removal to the United States District Court for the Western District of Texas (Tr. pp. 36-41), and executed bond for removal in due form (Tr. pp. 41-42). The Judge of the State Court on the 19th day of October, 1920, entered an order removing the case to the United States District Court, as prayed for (Tr. p. 43). Injunctions had been issued and duly served on the defendants (appellees herein) (Tr. pp. 43-49). In the United States Court defendants filed their original answer November 15, 1920, setting up their defenses to the bill of complaint (Tr. pp. 20-33), and on December 18, 1920, appellees filed their supplemental answer, pleading the issuance by the Interstate Commerce Commission on December 2, 1920, of a certificate of public convenience and necessity, authorizing the Eastern Texas Railroad Company to abandon its lines of railway between Lufkin, Texas, and Kennard, Texas, and dismantle and remove same (Tr. pp. 33-35).

Thereafter, on January 15, 1921, appellant, State of Texas, filed its supplemental bill of complaint in reply to the original and supplemental answers of appellees.

The cause thus being at issue on bill and answer, appellees, on December 8, 1920, filed in the United States District Court a motion to dissolve the temporary writ of injunction (Tr. pp. 50-51), and on March 15, 1921, filed a supplemental motion to dissolve the injunction (Tr. p. 52). The case thereupon came on to be heard before Judge Duvall West, Judge of the Western District of Texas, on motions to dissolve and on the merits.

Appellant asked permission to offer testimony showing that the action of the Interstate Commerce Commission in granting the certificate of public convenience and necessity was not authorized by the facts. On objections made by appellees, the Court held that this testimony was not admissible, to which appellant excepted. After full hearing the Court made an order sustaining the motion to dissolve and entered judgment in favor of appellees. (See opinion of the Court, Tr. pp. 60-62, and judgment of the Court, Tr. pp. 63-64, from which action of the Court the appellant appealed in due form to this Court, and assigned error as shown in transcript, pages 65-66.)

QUESTIONS OF LAW.

We conclude from the record and the brief of

appellant that the questions of law presented herein may be stated as follows:

1. Has Congress the power to authorize a railway company, incorporated under the general laws of a state and owning and operating a line of railway wholly within such state, which railway is engaged in transporting commodities of commerce, both intrastate and interstate, to abandon the operation of its railway and dismantle and remove the same, where the laws of the state prohibit such abandonment and removal?

2. Does the Transportation Act of 1920 authorize a carrier by railroad to abandon the operation of its lines and salvage its track upon the granting of a certificate of public convenience and necessity by the Interstate Commerce Commission without the approval of the state authorities?

3. Were the conclusions of fact found and reported by the Interstate Commerce Commission conclusive upon the District Court of the Western District of Texas, or should that Court have opened up the case on the facts and heard evidence contradicting the conclusions reached by the commission?

POWER OF CONGRESS.

We submit that the power to regulate interstate commerce conferred upon Congress by the Constitution of the United States is amply sufficient to authorize Congress to enact the provisions contained in paragraphs 18, 19, 20 and 21 of Section 402 of the

Transportation Act of 1920. The people of the United States originally possessed the power to regulate commerce, limited only by the unalienable rights of its citizens.

When the people determined to ordain and establish the Constitution and Government of the United States, they divided this power which they possessed to regulate commerce into two grand divisions; by Section 8 of Article 1 of the Constitution they conferred upon Congress the power to regulate commerce with foreign nations and among the several states, and with the Indian tribes; this power so conferred was limited only by the provisions of the Constitution and the unalienable rights of the people.

The power to regulate intrastate commerce remained with the states and the people thereof.

To prevent a conflict in the exercise of the power conferred upon Congress and the power remaining with the states, it was provided by the second paragraph of Article 6 of the Constitution of the United States as follows:

> "This Constitution, and laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

In order to grasp the full force and effect of this

provision, it must be kept in mind that the Constitution was ordained and established by "We, the people of the United States"; thereby making the above paragraph the act and declaration of each citizen of the United States. Therefore, to understand the power conferred upon Congress, it is only necessary to understand what is meant by the words "to regulate commerce". It will be admitted without controversy, that "commerce" embraces all the instrumentalities used in conducting commerce with foreign nations and among the several states.

It will also be admitted that a corporation organized under the laws of a state, and authorized by such laws to engage in transporting commerce, state and interstate, becomes and is an instrumentality of commerce with foreign nations and among the several states, and as such instrumentality is subject to be regulated by Congress.

Does the power to regulate include the power to authorize the abandonment and dismantling of an instrumentality of commerce when the public convenience and necessity will permit?

It would seem conclusive that the governmental power to authorize the creation of one instrumentality or to permit the use of an instrumentality in commerce, would embrace the power to permit the stoppage of such use. It will surely follow that when an instrumentality is no longer used in commerce, then the governmental power to permit the dismantling of

the same, and the salvage of the materials therein contained, would of necessity exist. We do not understand that the appellant seriously questions these conclusions, and suit is based largely on the contention that the Eastern Texas Railroad Company did not procure the consent of the State to the dismantling and removal of its line of railway.

Appellant holds that the State has authority to grant this permission to abandon and salvage an instrumentality of commerce. If the State has the power, by reason of its power to regulate commerce (intrastate), then why hasn't Congress the power to permit such dismantling and salvage where Congress possesses power to regulate commerce (interstate)?

The State's position is, as we understand it, that Congress hasn't this power, because Congress did not authorize the creation of the instrumentality. We submit that this contention is not tenable. When the Government of the United States was established, commerce was not divided; it was the power to regulate commerce that was decided and distributed between the United States and the several states. Persons engaged in commerce proceeded to conduct their commercial dealings just as they had done before, except they were required to comply with the regulations, state and federal. Instrumentalities of commerce were created and used, sometimes by the authority of the State, and sometimes by the authority of the United States. Again, the instrumentalities were created and

used in commerce, both state and interstate, without the authority of either the State or the United States. In other words, the authority by which an instrumentality is created, as in the case of a corporation authorized to construct a railroad, had no real bearing or effect on the right of the State, or of the United States to regulate the commerce conducted by the aid of such instrumentality. Where such instrumentality is constructed by the State, and subsequent thereto Congress decides that the public convenience and necesssity requires its removal, Congress has the power to authorize the dismantling of such instrumentality without the consent of the State.

WATER TRANSPORTATION—AUTHORITIES AND ARGUMENT.

The leading case upon this question is Gibbons vs. Ogden, 9 Wheaton, page 1, 6 L. Ed. 23. That case involved the constitutionality of an Act of the Legislature of the State of New York granting to Robert R. Livingston and Robert Fulton exclusive rights to navigate the waters within the jurisdiction of the State of New York by boats propelled by steam power, and the conflict of said Act of the State of New York with the laws of the United States passed by Congress governing coasting trade. Chief Justice Marshall delivered the opinion of the court, and on the question of the grant of power to Congress to regulate commerce, at page 196 L. Ed. 70, said:

"We are now arriving at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

At pages 210 and 211, 6 L. Ed. 73, in discussing the contention "that if a law, passed by a state in the exercise of its acknowledged sovereinty, comes into conflict with a law passed by Congress in pursuance

of the Constitution, they affect the subject, and each other like opposing powers," the Chief Justice added:

> "But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law."

And after further discussion, says:

> "In every such case the Act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Mr. Justice Johnson, in a concurring opinion in Gibbons vs. Ogden, at page 227, 6 L. Ed. 77, said:

> "The 'power to regulate commerce', here meant to be granted, was that power to regulate commerce which previously existed in the states. But what was that power? The states were, unquestionably, supreme, and each possessed that power over commerce which is acknowledged to reside in every sovereign state, ***
>
> "The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power

carries with it the whole subject, leaving nothing for the state to act upon."

The power of Congress in the regulation of interstate and foreign commerce was tersely expressed in the case of Sinnot vs. Davenport, 22 Howard 227, 16 L. Ed. 247, wherein the Court say:

"The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.

"This paramount authority of the Act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the states. They surrendered this power to the general government; and to the extent of the fair exercise of it by Congress, the Act must be supreme."

Again, on the power of Congress in regulating interstate and foreign commerce, the Supreme Court in construing the Act admitting the State of Oregon, in the case of Williamette Iron & Bridge Company vs. Hatch,

125 U. S. page 1, 31 L. Ed. 629, said at page 12, L. Ed. 633:

> "We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the states have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the states, or the individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose."

That part of the above quotation with reference to Congress not being concluded by anything that the State, or that individuals by its authority or acquiescence, have done, when Congress assumes control of the matter, is peculiarly applicable to the case at bar, as the State of Texas had prohibited the removal of a main line of railway prior to the passage of the Transportation Act of 1920.

The construction of the Constitution announced in the foregoing cases has been uniformally followed by the Federal Courts in all cases referring to transportation by water. We deem it unnecessary to enumerate the cases or the Acts of Congress construed therein.

We refer, however, to the case of Union Bridge Company vs. United States, 204 U. S. page 364, 51 L. Ed. 523. This was a case where the bridge company had constructed a toll bridge over the Alleghany River at Pittsburg, under a charter granted by the State of Pennsylvania. It is apparent that the toll bridge was used in intrastate commerce, and the rights of the company under the State charter were the same as the rights of the Eastern Texas Railroad Company under the laws of Texas and its charter; therefore, the same principles were involved in that case as in the case at bar. The State had authorized the construction of, and its people were using the bridge for intrastate business; and the bridge company was deriving revenue therefrom. Complaint was made that this use by the State authority was a burden upon and obstructed the use of the river for interstate commerce. Under the provisions of the Act of Congress this complaint was made to the Secretary of War, who was authorized by the Act of Congress to hear the matter and order any obstruction removed. Secretary Root first acted in the matter, and subsequently Secretary Taft. The order was made and the bridge company refused to obey it. Thereupon, under the Act of Congress criminal proceedings were instituted against the bridge company and a fine of $5,000 was assessed for such failure to obey the order; this fine was made a continuing fine at the rate of $5,000 per month. The case was appealed to the Supreme Court of the United

States by the bridge company. After reviewing the authorities and facts, Justice Harlan, speaking for the court, at page 400, 51 L. Ed. 539, said:

> "There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the government that it cannot exert its full power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been as unreasonable, obstruction to commerce and navigation, as then carried on, it must be taken, under the cases cited, and upon principle, not only that the company, when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the states, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navi-

gation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the water ways of the United States, cannot have the effect to cast upon the government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the government to secure the free and unobstructed navigation of the water ways of the United States. We cannot give our assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all water ways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a water way of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made."

RAILROAD TRANSPORTATION—AUTHORITIES AND ARGUMENT.

The cases cited are authority for the proposition

that the power of Congress to regulate commerce cannot be limited by the Acts of a State or a corporation chartered under the authority of a State; which means the contract between the State and the corporation is subject to the power of Congress, and was so subject at the time the charter was granted by the State.

The construction of railroads in this country, and the transportation of commerce by means of railroads, was commenced without any legislation, either State or Federal. In its earliest stages the various states authorized the formation of corporations for the construction of railroads; and under State authority railroads were largely developed. As their importance in commerce became more and more manifest, their regulation by the states was gradually developed. Finally, when Congress determined that the public interest required their regulation by that body, it entered the field and began the exercise of its powers.

ACT TO REGULATE COMMERCE.

The first great step taken by Congress in this regulation was the passage of the Act to regulate commerce, which was approved February 4, 1887 (24th Statutes at Large 379), and was amended from time to time down to and including the Act of August 10, 1917 (40th Statutes at Large 272).

There has been much litigation under this Act to regulate commerce, and the amendments thereof. It is unecessary to follow the development of the con-

struction of this Act by the various decisions of the Federal Courts. For the purpose of this caes it is sufficient to refer to the review of these decisions contained in the case of Mondou vs. New York N. H. & H. R. Co., 223 U. S. page 1, 56 L. Ed. 327, in which case Mr. Justice Van Devanter, at page 746, 56 L. Ed. 344, stated the power of Congress with reference to railroads as follows:

"The clauses in the Constitution (Art. 1, par. 8, clauses 3 and 18) which confer upon Congress the power 'to regulate commerce *** among the several states', and 'to make all laws which shall be necessary and proper for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

"1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land. ***

"3. 'To regulate', in the sense intended is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

"4. This power over commerce among the states so conferred upon Congress is completely in itself, extends incidentally to every instrument and agent

> by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce."

This was one of the employers' liability cases, and after the above quotation and the citation of many authorities, Justice Van Devanter said, quoting from the brief of the Solicitor General:

> "Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act." (Previously he had defined commerce as an act.)

The Justice thereupon holds that the Act under consideration was within the power of Congress, and passing to the question which has already been presented, as to whether or not the Employers' Liability Act superseded the State Constitution and Laws, he quotes from the opinion of Chief Justice Marshall in McCullough vs. Maryland, 4 Wheaton 316, 4 L. Ed. 579, closing with the following paragraph quoted from page 426:

"This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them."

The Mondou case was followed by the case of Houston, East & West Texas Railway et al. vs. United States, 234 U. S. page 342, 58 L. Ed. 1341. This was a case in which the Interstate Commerce Commission had an order authorizing the railroad companies involved to increase their intrastate rates in the State of Texas, so as to eliminate and prevent discrimination against rates for interstate transportation. In delivering the opinion, Mr. Justice Hughes, at page 1347, among other things, said:

"The invalidity of the order in this aspect is challenged upon two grounds:

"(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

"(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the commission exceeded the limits of the authority which has been conferred upon it.

"First. It is unnecessary to repeat what has frequently been said by this Court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this

power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrences of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating legislation'. By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. Gibbons vs. Ogden, 9 Wheat. 1, 196, 224; Brown vs. Maryland, 12 Wheat. 419, 446; County of Mobile vs. Kimball, 102 U. S. 691, 696, 697; Smith vs. Alabama, 124 U. S. 465, 473; Second Employers' Liability Cases, 223 U. S. 1, 47, 53, 54; Minnesota Rate Cases, 230 U. S. 352, 398, 399.

"Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (The Daniel Ball, 10 Wal. 557, 564); to adopt measures 'to promote its growth and insure its safety' (County of Mobile vs. Kimball, supra); 'to foster, protect, control and restrain' (Second Employers' Liability Cases, supra). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the

control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. Baltimore & Ohio Railroad vs. Interstate Commerce Commission, 221 U. S. 612, 618; Southern Railway Co. vs. United States, 222 U. S. 20, 26, 27; Second Employers' Liability Cases, supra, pp. 48, 57; Interstate Commerce Commission vs. Goodrich Transit Co., 224 U. S. 194, 205, 213; Minnesota Rate Cases, supra, p. 431;

Illinois Central Railroad Co. vs. Behrens, decided April 27, 1914."

TRANSPORTATION ACT, 1920.

Congress passed the Transportation Act after a great deal of labor and investigation. It is a fact well known that Congress, in this investigation, went fully into the decisions of this Court bearing upon the subjects embraced in the Transportation Act. The extent of the power of Congress was fully considered by that body, and the conclusions reached as to the extent of that power, so far as exercised in the Transportation Act, are worthy of the most careful consideration. The United States was then in control of the entire railroad system of the country and had been for a period of two years. The United States Government had become familiar with the necessities of the railroads. It had also had an opportunity to observe what regulations should be enforced by Congress so as to properly protect interstate and foreign commerce. This protection necessarily included the question of any regulations by the states that impeded or burdened or interfered with the free flow of interstate or foreign commerce. This was emphasized by the fact that in the Transportation Act, Congress contemplated aiding interstate commerce by an arrangement whereby the Government of the United States would, in a limited way, lend its credit to the railroad companies of the country, under the supervision of the Interstate Commerce Commission.

For this reason, the matter of extensions of existing lines of railroad became of paramount importance in the enactment of the Transportation Act. Thereupon Congress determined that it would regulate such extensions, and the exercise of this power by Congress is not challenged by the appellant in this cause.

It was inevitable, when the subject of extension was considered by Congress, that the subject of abandonment of railroads that should not be operated would present itself. It could not be ignored for the reason that interstate commerce should not be burdened by the expense of operating railroads where the public necessity and convenience would permit their abandonment. Therefore, Congress embraced within the Transportation Act provisions regulating the extension and abandonment of railroads. These provisions were made as an amendment to Section 1 of the Act to Regulate Commerce, and are contained in paragraphs (18) to (21) inclusive, and are as follows:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line or railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will

require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the Governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described

in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a

common carriers its car service as that term is used in this act, and to extend its line or lines; provided, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

CONSTRUCTION OF PARAGRAPH TWENTY

With reference to these provisions, the appellant, in its brief, beginning at page 11, contends that Congress did not mean what it said in that portion of paragraph (20) above quoted, which is as follows:

> "From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approved other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby."

In other words, the appellant contends that the above quotation means that the Eastern Texas Rail-

road Company could preceed with the abandonment in this case without applying to the Federal Government for further approval; but does not mean that it could proceed without the approval of the State.

The first objection to this construction of this language by appellant is that, if appellant is correct, the provision last quoted would be wholly unnecessary. These paragraphs provide for an application to the Commission for the right to abandon a line of railroad. The form of this application is left to the Commission, but the Commission is required, when such application is filed, to give notice of the filing of the same; one of these notices to be filed with the Governor of the State in which the railroad which the carrier desires to abandon is situated. This requirement, of course, was intended to inform the State authorities that a carrier by railroad, situated within the State, was asking permission to abandon the operation of such railroad; thereby giving the authorities of the State opportunity to take such action as they might deem proper. In addition to this notice to be filed in the office of the Governor, a notice was required to be published in a newspaper of general circulation in each county in or through which the line of railroad was operated; so that any party interested in the subject could appear at the hearing. Now, the certificate to be applied for was "a certificate that the present or future public convenience and necessity permit of such abandonment". In these paragraphs the Commission was au-

thorized to issue this certificate with such conditions attached as, in its judgment, public convenience and necessity required.

When this was done and the conditions contained therein complied with, then Congress declared that the carrier by railroad might "without securing approval other than such certificate", proceed with the abandonment of the railroad described.

Keeping in mind that Congress is the supreme power in the regulation and control of the instrumentalities used in interstate commerce, we submit, without fear of successful contradiction, that Congress intended that the right might be exercised without the approval of any other authority whatsoever. It would have been a use of unnecessary words to have added the words "State or Federal"; because both the State and the Federal Government were embraced in the language used by Congress as well as all other authorities existent in the world.

However, appellant supports its contention by referring to paragraph (17) of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act. That paragraph relates to the provisions of the Act regulating matters of equipment, car shortage, etc., and requires compliance by carriers with the orders of the Commission with reference to the subjects referred to, and makes a failure to comply, an offense, and prescribes a penalty therefor. After making these provisions, Congress then put a proviso upon

said paragraph (17), and enacted that the provisions made should not interfere with the right of the State to exercise its police power on the same subject. In the interest of clarity, this was necessary. Appellant then, in its brief, on page 15, refers to Section 15 of the Federal Control Act, which section is simply an explanation by Congress that it is not intended that the Federal Control Act should affect laws of the State with reference to taxes and other subjects mentioned. This declaration of Congress supports our position, because it indicates that Congress was afraid the Federal Control Act would interfere with the laws referred to, unless such laws were expressly exempt from the effect of the Federal Control Act.

In the Case of Johnson vs. Southern Pacific Company, 196 U. S. page 1, 49 L. Ed. 363, the Court passed upon the construction of the Safety Appliance Act. Chief Justice Fuller delivering the opinion of the court, beginning at page 14, L. Ed. 368, laid down the general rule for construing acts of this character, and at page 18, L. Ed. 370, quoted and adopted the following general rule:

> "In short it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Following this rule and taking the entire Transpor-

tation Act, it is apparent that where Congress took jurisdiction of the subject matter, by the provisions of the Act, it was the intention of Congress to make its action, or the action authorized complete in itself, unless it expressly limited the same.

In the case of Houston East & West Texas Ry. Co. vs. United States, 234 U. S. 342, 58 L. Ed. 1341, Mr. Justice Hughes delivering the opinion of the court, and passing upon the construction of the provisions giving power to the Interstate Commerce Commission to prevent discriminations, held that the authority applied to a discrimination made by rates established under state authority, although the Act of Congress did not so declare. Referring to the Act to regulate commerce, at page 356-7, L. Ed. 1350, he showed that this Act on its face provided that it is not to extend to purely intrastate traffic, referring to the Minnesota rate case, where there had been no finding by the Commission that the rates involved were discriminatory. Then referring to the case at bar, he said:

> "Here, the Commission expressly found that unjust discrimination existing under substantially similar conditions of transportation, and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in paragraph 1 does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of

transportation that was 'wholy within one state.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one which Congress alone competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised, and that the subject was thus left without governmental regulation."

We conclude, therefore, under the authority of these cases that the words "without other approval than such certificate" excluded the authority of the state; and we also conclude that if these words had been omitted, the authority from the Commission to abandon the road would not have been impaired.

DO PARAGRAPHS 18, 19, 20 and 21 CONFER JUDICIAL AUTHORITY UPON THE COMMISSION?

Appellant in its brief, beginning at page 17, contends that they do; appellees deny this contention.

The contention of Appellant is based on the provision that when an application is filed before the Commission, it is required to give notice, and the

parties objecting to the granting of the Application are authorized to appear and contest the same at a Hearing before the Commission; and that the Commission after such hearing, is authorized to issue a certificate that the present or future public convenience or necessity permit of such abandonment. The power conferred upon the Commission is contained principally in paragraph 20, where it is declared the Commission shall have power to issue such certificate as prayed for, etc.

We submit that the power conferred is not the exercise of a judicial function, but is the granting of a permit, a license, and certificate to one of a class of persons whom Congress has declared have the right to such license, permit or certificate, when it is ascertained that they come within such class. The granting of such certificate is, therefore, an administrative act by an agency authorized by Congress to grant the same, upon the ascertainment that the conditions named, exist.

The conditions on which such certificates is to be granted are political in their nature. It is the public convenience and necessity which is to be ascertained; and the question to be determined is, does the public convenience and necessity permit the exercise of the power, and the issuance of the certificate to the carrier by railroad. Congress has the power to determine what are the conveniences to which the public are entitled and the necessities which the public require; it has the power to determine when such convenience and necessity

of the public will or will not permit the doing of a certain act, and it may ascertain such public convenience and necessity in such manner and by such means as it deems appropriate.

In the paragraphs quoted Congress has provided the method and means by which the public convenience and necessity should be ascertained, and has provided that when they permitted the abandonment of a railroad, a certificate to that effect should be issued. When the method prescribed by Congress has been followed, and a certificate issued the conclusions reached by its designated agency forecloses the matter, so far as the judicial branch of the government is concerned; for the reason that the questions of public convenience and necessity are legislative in their nature, when they refer to present and future requirements.

Paragraphs of the Transportation Act under consideration have reference to what is now required by the public and what the future requirements will be; and the question that Congress was determining and upon which it authorized a hearing by the Commission was whether or not such requirements would permit the abandonment of a railroad. The past was not involved, excepting in so far as it was necessary to investigate past conditions so as to properly ascertain and determine present and future conditions.

Appellant lays particular stress upon the announcements of this court made in the case of Prentis vs. Atlantic Coast Line Company, 211 U. S. 226-7, 53 L. Ed.

158-9. We find nothing in this case which contravenes the idea above suggested; on the contrary the case sustains our contention. This court, among other things, says:

> "Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. 720, no matter what may be the general or dominant character of the body in which they may take place. * * *
>
> That question depends not upon the character of the body, but upon the character of the proceedings. * * * And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up."

Appellees' contention that the granting of permission to abandon a railway is legislative, and not a judicial act, is supported by authority of the State of Texas itself.

The Legislature of the State of Texas granted to the Texas, Arkansas & Louisiana Railway Company permission to take up its railroad tracks constructed between the town of Atlanta and Bloomburg, Texas, both in Cass County, a distance of eight or nine miles, and all switches, sidings, etc., and to remove all other kinds of material, equipment and sell and dispose of the same by an act of the Legislature passed and approved March

17, 1919, General Laws State of Texas Thirty Sixth Legislature, Regular Session 1919, page 130. In the second section of said Act, page 131, the Legislature found as a fact that the railroad company was not able to pay its operating expenses, that its track was in a dangerous condition for use, the engine owned was not safe to run, the road could not serve the public in any way in its present condition, the material was deteriorating and would become a total loss unless relief was granted, and that these facts, and the crowded condition of the legislative calendar created an emergency for the passage of the law.

Surely it would have been just as proper a legislative act for the Legislature to have referred the matter to the Railroad Commission of Texas to find these facts and to issue a certificate as it would have been to have passed the act referred to.

At the same session of the Legislature of the State of Texas a similar Act was passed, by the first section of which the Riviera Beach & Western Railway Company, its successors and assigns, was given permission "to take up and move its entire line of railway, including all rails, ties, angle bars, track fastenings, switches, sidings, signs, turnouts, wyes, depots, water and fuel stations and all other material and equipment belonging to said Company, including the line of railway from the station of Riviera, where the said Riviera Beach & Western Railway Company connects with the line of road of the St. Louis, Brownsville & Mexican

Railway Company to the eastern terminus of said line at Riviera Beach, a distance of approximately ten (10) miles, and to sell or dispose of all said material, including said Company's lands and roling stock in such manner as it may see fit, and to abandon all of its tracks and line of railroad."

By the second section of said Act the Railroad Corporation was permitted to dissolve.

By the Third section, it was found by the Legislature that "The fact that the said Riviera Beach & Western Railroad Company has never been able to pay its operating expenses, and the fact that a line of railroad between Riviera and Riviera Beach is not required to serve the public interest, and the further fact that its track and equipment is rapidly deteriorating will soon become a total loss to its owners, creates an emergency and an imperative necessity which requires that the constitutional rule providing that bills be read on three several days be suspended and etc."

This Act is contained in the same volume, Sheet Acts General Law of the State at pages 39 and 40.

The same session of the Legislature of Texas passed a similar Act granting permission to the Texas Southeastern Railway, its successors and assigns, to take up and remove its line of railway from the station of Vair, where it connected with the line of railway of the Groveton, Lufkin & Northern Railway Company, to the station of Neff, a distance of 7.7 miles; and by the second section of said Act, the Legislature found practically

the same facts as were found in the two foregoing Acts. See General Laws State of Texas, Sheet Acts 1919, Thirty Sixth Legislature, page 96.

A similar Act was passed permitting the Artesian Belt Railroad to take up its tracks in Bexar County, Texas, and the same facts found, which Act is contained in the same General Laws of the State of Texas, Sheet Acts 1919, page 115.

However, we do not wish to be understood as saying that Congress cannot confer upon the Interstate Commerce Commission power to ascertain any fact and make any order necessary to carry into effect the powers conferred upon Congress, whether such finding is similar to the action of a court or not.

CONTRACT IN CHARTER WITH THE STATE AND THE CONTROL OF PHYSICAL PROPERTY OF CORPORATIONS.

Appellant insists that the Constitution and Laws of the State became a part of the Charter contract between the Eastern Texas Railroad Company and the State of Texas. If this be admitted, it will then follow that the Constitution of the United States and laws passed by Congress in pursuance thereof, also become a part of the charter of such railway Company; thereby there will be engrafted on the contract between the State and the Railway Company the provisions of the Constitution of the United States authorizing Congress to regulate commerce among the States, and the provision of said Constitution making the regulations by

Congress paramount to the Constitution and laws of the State. This alone would justify the opinion and judgment of the Trial Court in this cause; because Congress had passed the paragraphs of the Transportation Act heretofore set out; this was a legislative act regulating commerce and is conclusive on all parties, including the State of Texas.

Appellant seems, however, to rely upon the case of Northern Securities Company vs. United States, 193 U. S. 333, 48 L. Ed. 679, but that case does not sustain the views of Appellant. In the opinion in that case, this court said, at page 333, L. Ed. 698:

> "An act of Congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. Cohen vs. Virginia, 6 Wheat 264, 385, 414, 5 L. Ed. 257, 286, 293. These views have been often expressed by this court."

Appellant refers also to the case of L. & N. Railway Company vs. Kentucky, 161 U. S. 699, 40 L. Ed. 849, as sustaining the position of Appellant. The issue in that case was with reference to a prohibition by the State

of Kentucky against the consolidation of railways, and the point was made against such prohibition, that it was void because of the grant to Congress of the power to regulate commerce among the states, and this court held against such contention. It will be observed that Congress at that time had not acted upon the subject, and, therefore, the case comes within the rules that the State could act upon the subject in the absence of the action by Congress. Also, the question of consolidation is not similar to the question at bar. It should be noted also that Congress has now acted upon the subject of consolidating railroads by the provisions contained in the Transportation Act, and this question is not before the court.

The case of C. M. & S. T. Paul Ry. vs. Minn. C. & C. Assn., 247 U. S. 490, 62 L. Ed. 1229, was one in which the question was presented of whether or not a mile or two of terminal railway owned by a Terminal line was an independent railway, where the facts showed that it had entered into a contract with two other lines of railway, which deprived its Board of Directors of the power of control, and where the manner in which the traffic was handled showed that it became a mere agency or extension of the two other main lines referred to. It was appealed from a decision of the Supreme Court of the State of Minnesota, holding that there had been a consolidation of this Terminal Railway with the other lines. The holding of the Supreme Court was based on findings of the State Commission

and the decision of the state District Court. This court affirmed the holding of the State Supreme Court.

There was no similarity in that case and the case at bar. Here the St. Louis Southwestern Railway Company, a Missouri corporation, had purchased the stock of the Eastern Texas Railroad Company. There is no other proof of consolidation except that thereafter the officers of the two southwestern Companies and the Eastern Texas Railroad Company were very similar, but it was shown that the organization of the Eastern Texas Railroad Company was continued, and that the divisions which it obtained on traffic were fair and reasonable, and all other things showed in connection with its control and operation continued it as an independent railroad under the Constitution and Laws of the State of Texas. This is apparent from the pleadings contained in the transcript. See Defendant's Answer and Supplemental Answer, pages 20 and 33 of report of the Interstate Commerce Commission, pages 53-57 inclusive. We submit, therefore, that the question of the Eastern Texas Railroad being a part of the Cotton Belt system is not involved in the case.

See also Peterson vs. C. R. I. & P., 205 U. S. 36; 51 Fed. 841.

DUE PROCESS OF LAW—FOURTEENTH AMENDMENT.

A carrier cannot be compelled to carry on even a branch of its business at a loss, much less the whole business of the carrier.

The above proposition is quoted from the opinion of this court in the case of Brooks-Scanlon Company vs. Railroad Commission of Louisiana, 251 U. S. 396, 64 L. Ed. 323, which was a case in which the Appellant, Brooks-Scanlon Company, brought suit against the Railroad Commission of Louisiana, seeking to set aside an order of that Commission requiring the plaintiff, either directly or through arrangements made with the Kentwood & Eastern Railway Company to operate its narrow guage railway between Kentwood and Hackley in Louisiana. Plaintiff claimed it could not operate said road without a loss, and that this would deprive plaintiff of its property without due process of law. Appellee, the Louisiana Commission, denied these allegations and in reconvention prayed for an injunction against the tearing up and abandoning the road and for a mandate upholding the order. In the trial court in Louisiana a preliminary injunction was issued, but was dissolved, and on final hearing a judgment was entered holding the order of the Commission void. There was an appeal to the Supreme Court of Louisiana, where the decision was reversed, and the injunction reinstated as prayed for. Writ of certiorari was issued to this Court to review that judgment, and this Court made the above statement of the law governing the question involved.

The opinion shows that the Louisiana Commission relied upon the contract embraced in the charter granted under the State law. This Court recognized the right of the State to require the exercise of the

charter powers, and said:

> "If the plaintiff be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss."

Again this Court say:

> "Whatever may be the forms required by the local law, it cannot give the court or Commission power to do what the Constitution of the United States forbids, which is what the order and injunction attempt. Pennsylvania R. Co. vs. Public Service Commission, November 10, 1919, 250 U. S. 566, 63 L. Ed. 1142."

The above case is practically on "all fours" with the case at bar, and is supported by the case of C. B. & Q. Ry. vs. Chicago, 166 U. S. pp. 224-6, 41 L. Ed. 979, in which at page 233 this court, speaking through Mr. Justice Harlan, said:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State'. This must be so, or as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to

annul or evade it'. Ex parte Virginia, 100 U. S. 339, 346, 347 (25, 676, 679); Neal vs. Delaware, 103 U. S. 370 (26, 567); Yick vs. Hopkins, 118 U. S. 356 (30, 220); Gibson vs. Mississippi, 162 U. S. 579 (40, 1078). These principles were enforced in the recent case of Scott vs. McNeal, 154 U. S. 34 (38, 896), in which it was held that the prohibitions of the Fourteenth Amendment extended to 'all acts of the State, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the Fourteenth Amendment."

This is followed by reference to a large number of authorities, and one which is specially pertinent is the case of Scott vs. Toledo, 36 Fed. 385, 395, 396.

See also Reagain vs. Farmers' Loan & Trust Co., 154 U. S. 302, 38 L. Ed. 1014.

Missouri Pacific Ry. vs. North Dakota, 236 U. S. 585, 59 L. Ed. 735.

EXERCISE OF POWER TO REGULATE BY CONGRESS—MISCELLANEOUS.

When Congress exercised its power to regulate interstate commerce, upon commerce itself or any facility or instrumentality used in commerce or on contracts

controlling the conduct of such commerce, by passing an act on the subject, such Act of Congress is supreme, and all laws of the State must yield thereto.

On the subject of furnishing cars, see C. R. I. P. & P. Ry. Co. vs. H. F. Elevator Co., 226 U. S. 426, 57 L. Ed. 384.

On State penalties for refusal to receive and forward interstate commerce, see Southern Ry. vs. Reid, 222 U. S. 424, 56 L. Ed. 257; Atlantic Coast Line R. Co. vs. Riverside Mill, 219 U. S. 186, 55 L. Ed. 167; St. L. S. W. Ry. Co. vs. Arkansas, 217 U. S. 136, 150, 54 L. Ed. 698, 705.

On regulation of instrumentalities of interstate commerce generally, see Gloucester Ferry Co. vs. Penn., 114 U. S. 196, 29 L. Ed. 158; U. S. vs. C. C. Knight Co., 156 U. S. p. 1, 39 L. Ed. 325.

On the exercise of State police powers, see Railroad Commission cases, 116 U. S. 307, 331, 29 L. Ed. 636, 644; Central R. R. Co. vs. Murphy, 196 U. S. 194, 49 L. Ed. 444.

This rule binds all branches of the State Government. Henderson vs. New York, 92 U. S. 259, 23 L. Ed. 343; Hannibal & St. Jo R. Co. vs. Husen, 95 U. S. 465, 24 L. Ed. 527.

On hours of service, Northern Pacific Ry. Co. vs. Washington, 222 U. S. 370, 56 L. Ed. 237; also Erie R. R. Co. vs. New York, 233 U. S. 671, 58 L. Ed. 1149.

On delegation of the power of Congress to admin-

istrative officers, see Oceanic S. N. Co. vs. Stranahan, 214 U. S. 320, 53 L. Ed. 1013.

On the subject of accounting and bookkeeping, requiring of reports of carriers by water on the Great Lakes, engaged in transporting passengers and property partly by railroad and partly by water, see I. C. C. vs. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729; K. C. S. Ry. Co. vs. United States, 231 U. S. 423, 58 L. Ed. 296.

On rate for long and short hauls, see United States vs. A. T. & S. F. Ry. Co., 224 U. S. 476, 58 L. Ed. 1408.

On delegation of power by Congress to the Interstate Commerce Commission, see K. C. S. Ry. Co. vs. United States, 231 U. S. 423, 58 L. Ed. 296.

ABANDONMENT OF PART OF LINE.

Appellant contends that the Interstate Commerce Commission has no authority under the statute to grant to a railway company a certificate of public convenience and necessity authorizing it to abandon a part of its main line track, in the absence of a showing that the entire system is losing money.

We submit that this not the law. The Brooks-Scanlon case, heretofore cited, is authority for the contrary doctrine. The construction by the Interstate Commerce Commission of the provisions of the Transportation Act in this particular is persuasive. See report of its action in the following applications:

Finance Docket 28, decided November 24, 1920,

granting application of Pere Marquette Railway Company to abandon branch line constructed to develop timber;

Finance Docket 56, decided November 13, 1920, granting application of Atchison, Topeka & Santa Fe Railway to abandon branch line constructed to develop mine.

APPELLANT'S SUIT WAS A COLLATERAL ATTACK UPON AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

The Act of Congress of October 22, 1913, containing provisions from the Urgent Deficiency Appropriations Act, provides that no interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any District Court of the United States, etc., unless the application for the same should be presented to the District Judge and heard and determined by three judges. It is also provided by law that such action should be brought against the United States. The suit of appellant was an independent suit in equity, brought in a State court, and is, therefore, a collateral attack upon the order of the Interstate Commerce Commission made December 2, 1920, granting the Eastern Texas Railway Company authority to abandon its railway.

If said action were permissible in any event, the

bill of complaint of appellant did not show any cause of action or authority to enjoin the action authorized by the Interstate Commerce Commission. See

Seaboard A. L. Ry. vs. Railroad Com. of Ga., 213 Fed. 27;

L. & N. Ry. Co. vs. Railroad Commission, 208 Fed. 35.

We submit that under the Constitution of the United States, and the laws passed in pursuance thereof, and under the authorities cited, the action of the District Court of the Western District of Texas dissolving the injunction in this cause and entering judgment in favor of appellees should be in all things affirmed.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,
Solicitors for Appellees.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 298

THE STATE OF TEXAS

vs.

EASTERN TEXAS RAILROAD COMPANY
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF AND ARGUMENT OF THE APPELLEES EASTERN TEXAS RAILROAD COMPANY, et al.

DANIEL UPTHEGROVE,
E. B. PERKINS,
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HAYWORTH PUBLISHING HOUSE, WASHINGTON, D. C.

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May it please the Court:

On November 8, 1900, the Eastern Texas Railroad Company, hereinafter for brevity called the Company, was incorporated under the laws of the State of Texas, and was thereafter constructed

from Lufkin, Texas, to Kennard, Texas, a distance of 30.3 miles, to develop certain yellow pine timber lands owned by the Texas and Louisiana Lumber Company in eastern Texas. In 1917 the Lumber Company finished cutting its timber, and the operation of the lumber mill at Ratcliffe was stopped and the mill dismantled. It quickly developed that without the output of the mill there would not be sufficient tonnage along the line of the Company to pay operating expenses. Immediately after the Transportation Act of 1920 became effective, the Company made application to the Interstate Commerce Commission to abandon the operation of its line and to take up and dismantle its railroad. On July 9, 1920, the State of Texas, hereinafter called the State, filed suit in the State Court at Austin, Texas, and obtained a temporary injunction against the Company, restraining it from abandoning the operation of its line. This cause was removed by the Company to the United States District Court for the Western District of Texas; and on March 15, 1921, that court, after trial of the case on its merits, rendered a decree in favor of the Railroad Company and dissolved the temporary injunction theretofore granted by the State Court. On the trial of the case the State in its pleadings raised the question and insisted that if the temporary injunction then existing was dissolved and not made permanent, the Railroad Company would take up its tracks and dismantle its property and thereby destroy the subject matter of the suit.

This question was also necessarily involved in the petition for appeal.

Although the District Court had all the parties before it and the entire subject matter under consideration it declined to restrain the Company from taking up its tracks and dismantling its property during the pendency of this appeal. The State in its application and brief raised the question as to whether or not the charter of the Company granted by the State constitutes a contract, and also whether or not the Company is a part of the St. Louis Southwestern Railway system. These questions, we submit, should only be considered by this court upon the submission of this case on its merits, and the only question now under consideration is whether or not this court should grant an injunction restraining the Company from dismantling its road pending this appeal. We submit that the State's application for an injunction pending this appeal should be dismissed for the following reasons to wit:

I.

BECAUSE THE ORDER OF THE INTERSTATE COMMERCE COMMISSION GRANTING THE COMPANY A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AUTHORIZING IT TO ABANDON THE OPERATION OF ITS LINE AND TAKE UP AND SALVAGE ITS PROPERTY, IS FINAL AND CONCLUSIVE AND IS NOT SUBJECT TO COLLATERAL ATTACK BY THE STATE IN THIS CAUSE.

The Company contends that the order of the Interstate Commerce Commission under review is not subject to collateral attack by the State in its suit against the Company, and that the only method provided by law to restrain the Company from carrying out the order of the Commission would be to bring a direct proceeding against the United States. Paragraph second of Section 207 of the Judicial Code provides that the Commerce Court shall have exclusive jurisdiction over "cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." Compiled Statutes of 1918, Section 993, paragraph second.

By the Act of October 22, 1913 (c. 32, 38 Stat., 219) the jurisdiction of the Commerce Court was transferred to the various District Courts.

In the Illinois Passenger Fare case (*Illinois Central Railroad Commission vs. Public Utilities Commission,* 245 U. S., 493), this court held:

> "The cross-bills assailed the validity of the Commission's order on various grounds and concluded with a prayer that it be set aside and annulled and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. Passing the fact that they were presented as *cross* bills, it is apparent that in subject matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code, pp. 208, 211; c. 32, 38 Stat., 219-220, and the jurisdictional

provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and being suable only by its consent, could not be sued in a district not within the consent given."

* * * * * * *

"As before indicated, the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the State authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the Court empowered by law to entertain a suit of that nature."

In the case of United States vs. Louisville and Nashville Railroad Company, 235 U. S., 314, which involved a controversy as to the legality of a reshipping privilege, at Nashville, Tenn., by the carriers, this Court laid down the following rule:

"In view of the doctrine announced in *Interstate Com. Com. v. Illinois Cent. R. R.*, 215 U. S., 452; *Interstate Com. Com. v. Delaware, L. & W. R. R. Co.*, 220 U. S., 235; *Interstate Com. Com. v. Louisville and Nashville R. R.*, 227 U. S., 88, it plainly results that the court below, in substituting its

judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn. etc. Ry. Co. v. Interstate Com. Com.*, 181 U. S. 1, 23-29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise, since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

To the same effect is the holding of this Court in the case of *Texas and Pacific vs. Cisco Cotton Oil Company*, 204 U. S., 426. *Loomis vs. Lehigh Valley R. R.*, 240 U. S., 43.

The contention of the Company therefore briefly

is that the order of the Interstate Commerce Commission is binding and conclusive upon both the State and the Company and cannot be attacked by the State in this suit; but if the State desires to enjoin said order, it should file a suit against the United States and obtain service and proceed as required by law. The order of the Interstate Commerce Commission was entered December 2, 1920, authorizing the Company to abandon its road and the State has therefore had ample time to bring such proceeding to enjoin the same. Having failed to pursue the remedy provided by law to enjoin said order, the Company now insists that the State has no right to enjoin the same or any part thereof.

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE STATE COULD NOT ENJOIN THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IN THIS SUIT AND THEREFORE THE DISTRICT COURT DID NOT ABUSE ITS SOUND DISCRETION IN REFUSING TO GRANT AN INJUNCTION PENDING THE APPEAL OF THIS CASE.

Equity Rule No. 74 provides that when an appeal is taken from a final decree in equity dissolving an injunction, the judge may, in his discretion, make an order sustaining, modifying or restoring the injunction during the pendency of the appeal. The District Court correctly concluded that the

State could not collaterally attack the order of the Interstate Commerce Commission, that it could not therefore enjoin the order in the instant case and correctly held that no injunction should be granted the State pending the appeal.

Our contention is, therefore, that under the facts and the law governing this case, the District Court was without power to continue the injunction in force. Granting, however, for argument sake, that it was within the discretion of the District Court, then we say that such discretion has not been abused. The findings of fact by the Interstate Commerce Commission show that there was a deficiency incurred in the operation of the Company's road in 1918 of $20,128.46. In 1919 it was $49,362.64. In January and February, 1920, it was $10,484.27; that the road had been in operation since 1902, and its Balance Sheet showed a credit balance of $32,393.68 on May 1, 1920. Company's answer pages 15-16.

The report of the Commission further shows that there are fifty (50) bridges and trestles, with a combined length of 8,862 feet, which range in height from 5 to 25 feet. That six (6) bridges and trestles, with a combined length of 2,280 feet were, at the time the report was made on December 2, 1920, in immediate need of renewal to insure safe operation, and all the others in need of heavy repairs. That the Company estimated that if operation were continued it would be necessary to expend $146,000 to $200,000 on its roadbed, bridges and trestles. The record further shows that the

Company offered to take $50,000 for its entire railroad, and the Commission ordered that the Company offer said line for sale for that amount, which was done but no bids were received. Company's answer pages 16-17. That the operating ratio of the Company was 440 per cent under the rates in effect immediately prior to the increase authorized in "Increased Rates, 1920, 58 I. C. C. 220." Company's answer page 16.

The situation presented, therefore, was this: The Railroad Company had offered all its property for sale at $50,000 and received no bid. In order to continue operation it was necessary to make an expenditure of from $146,000 to $200,000, or three or four times the value of the entire property. During the year 1919, there was a deficit of $49,-362.64, which was an approximate value of all the Company's property. At the time of the Commission's report, the Company's operating ratio was 440 per cent; in other words, for every $1 earned it was compelled to expend $4.40. In the fact of such facts the Court correctly concluded that no useful purpose could be served by compelling the Company to let its property lie while the State was prosecuting its appeal. Equity and fairness under the circumstances prompted the Court to permit the Company to proceed with the order of the Commission and save whatever salvage it could for its stockholders out of the rails, ties and other property of the Company.

III.

THE STATE SHOULD NOT BE PERMITTED TO DEPRIVE THE COMPANY OF ITS PROPERTY OR CAUSE IT TO SUFFER LOSS DURING THE PENDENCY OF THE APPEAL WITHOUT FIRST BEING REQUIRED TO GIVE BOND OR OTHER INDEMNITY TO PROTECT SAID COMPANY.

The State in its brief says that it cannot become a principal or surety on any bond, and that in no way would a bond bind it in damages; and that it can not, therefore, offer to make bond to secure appellees against damage by reason of an injunction issued by this Court.

We contend that this admission alone is sufficient to authorize this Court to decline to consider further the State's application. When the State filed this suit it laid aside its sovereignty and has no more rights in this Court than any private litigant. It is governed by the same principles of law and equity and is bound by the same rules of practice and procedure as private litigants. Certainly, no Court of equity would permit one private litigant to restrain another private litigant from enjoying the use of its property pending an appeal, without first requiring bond or other security to protect the party enjoined from all damages sustained pending the appeal. The State has no more rights in this regard than any private litigant. It has no more right to demand that the Company be deprived of the use of its property

by injunction during this appeal than a private litigant would have. As above stated, it has laid aside all of its sovereignty and is no more entitled to deprive this Company of the use of its property by injunction than a private citizen would have under the same circumstances. Furthermore, the State being a sovereign power cannot be sued without its consent. The Company therefore would have no recourse in the Courts to recover the damages sustained by it during the pendency of this appeal, so that the position of the State is that it is demanding of this Court that its adversary be required to sustain whatever loss or damage may occur pending the appeal, without giving bond or other indemnity and without its adversary having the right to have its claim adjudicated by the Courts while the State is taking an appeal to this Court.

It occurs to us that a statement of this position is its own answer.

We therefore submit that the State has shown no grounds authorizing it to have a writ of injunction pending this appeal and that the said application should be dismissed.

Respectfully submitted,

DANIEL UPTHEGROVE,
E. B. PERKINS,
Solicitors for Defendants.

case, could make no point and did make no point of the circumstance that the Federal question was not presented in the bill of complaint. Because of this principle, it must be assumed that this Court, in deciding that motion, proceeded upon the assumption that the alleged Federal question was properly presented to the State Supreme Court.

We respectfully submit, therefore, that this Court should grant our motion to dismiss, or that, if it does not do so, it should grant our motion to affirm the decree of the State Court, upon the ground (see *Worcester case*, 196 U. S. 539, set forth in our principal brief (pp. 7-9) in support of the motion in the Groesbeck case) that the contention that the municipality's contract obligations were impaired is entirely lacking in merit and needs no further argument.

Respectfully submitted,

Elliott G. Stevenson,
William L. Carpenter,
Counsel for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 563.

THE STATE OF TEXAS AND C. M. CURETON, PERSONALLY AND AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, CHARLES C. McCHORD ET AL., CONSTITUTING THE INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED OCTOBER 3, 1921.

(28,518)

SUPREME COURT OF THE UNITED STATES.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1921.

a Supreme Court of the United States, — Term, 192-.

No. —.

STATE OF TEXAS et al., Appellants,

vs.

UNITED STATES et al., Appellees.

—— ——, Counsel for Appellants.
—— ——, Counsel for Appellees.

Caption.

Be it remembered, that a term of the United States District Court for the Eastern District of Texas, begun on July 12th, A. D. 1921, and continued to and including the 21st day of September, A. D. 1921, the Honorable R. W. Walker, Senior Circuit Judge of the Circuit Court of Appeals of the Fifth Circuit, Honorable DuVal West, United States District Judge for the Western District of Texas, and the Honorable W. L. Estes, United States District Judge for the Eastern District of Texas, presiding; the following proceedings were had and the following cause came on for hearing, to-wit:

Equity. No. 42.

THE STATE OF TEXAS et al.

versus

UNITED STATES et al.

1 (1.)

In the District Court of the United States, Eastern District of Texas.

THE STATE OF TEXAS and C. M. CURETON, Personally and as Attorney General for the State of Texas, Plaintiffs,

v.

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. McCHORD, Balphaser H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Aitchison, Joseph B. Eastman, Mark W. Potter, John J. Esch, E. I. Lewis, and J. W. Campbell, Constituting the Interstate Commerce Commission; H. M. Daugherty, Attorney General of the United States; the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company of Texas, and the St. Louis Southwestern Railway Company, Defendants.

Petition and Bill of Complaint.

To the Honorable Judge of the District Court of the United States for the Eastern District of Texas:

Come the State of Texas, C. M. Cureton, personally and as Attorney General of the State of Texas, and bring this Bill of Complaint against the United States and the Interstate Commerce Commission, H. M. Daugherty, Attorney General of the United States, The Eastern Texas Railroad Company, The St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company
2 of Texas, and respectfully allege and show unto this Honorable Court:

I.

That the plaintiff, the State of Texas, is one of the sovereign States of the Union, and C. M. Cureton is a citizen of the State of Texas and of the United States and is Attorney General of the State of Texas, duly elected, qualified and acting as such, and has legal capacity to sue herein as will more fully appear with other necessary allegations of jurisdictional facts. The United States is made a party defendant herein by virtue of the authority and requirements of the Act of October 22, 1913, (38 State L. 219) and known as the District Court Act and because the Interstate Commerce Commission, defendant herein, claims to have derived its authority for the unconstitutional and illegal acts committed by said Interstate Commerce Commission, and hereinafter complained of, from said defendant, the United States, and because the unconstitutional statutes hereinafter complained of were enacted pursuant to the authority of said defendant, the United States. The Interstate Commerce Commission, one of the defendants herein, is a regulatory body claiming jurisdiction over common carriers engaged in Interstate Commerce and is constituted and existing under and by virtue of an Act of Congress known as the Interstate Commerce Act and consists of the following persons with their residences according to the information and belief of plaintiffs:

Edgar E. Clark, residing in the State of Iowa; Charles C. McChord, residing in the State of Kentucky; Balphaser H. Meyer, residing in the State of Wisconsin; Henry C. Hall, residing in the State of Colorado; Winthrop M. Daniels, residing in the State of New Jersey; Clyde B. Aitchison, residing in the State of Oregon; John J.
3 Esch, residing in the State of Wisconsin; Joseph B. Eastman, residing in the State of Massachusetts; E. I. Lewis, residing in the State of Indiana; Mark W. Potter, residing in the State of New York; J. W. Campbell, residing in the State of Washington.

H. M. Daugherty is Attorney General of the United States and has his domicile at Washington, D. C. The Eastern Texas Railroad Company is a corporation duly incorporated under the laws of the State of Texas, and has its general offices and place of business at

Tyler, Smith County, Texas, within the bounds of the United States District Court for the Eastern District of Texas, and having as its president, J. M. Herbert, who resides in St. Louis, Missouri; and that D. C. Dobbins, who resides at Tyler, Smith County, Texas, is its general superintendent; that said railroad company owns a line of railroad extending from Lufkin in Angelina County, Texas, to Kennard in Houston County, Texas, all of which lies wholly within the bounds of the United States District Court for the Eastern District of Texas, and that said railroad is doing business under the charter granted to it by the State of Texas on the 8th day of November, A. D. 1900, which said charter with all of its terms are hereinafter more fully pleaded.

The St. Louis Southwestern Railway Company is a corporation duly incorporated under the laws of the State of Missouri, having its general offices at St. Louis in the State of Missouri and having as its president, J. M. Herbert, who also resides at St. Louis, Missouri; and that the St. Louis Southwestern Railway Company of Texas is a corporation duly incorporated under the laws of the State of Texas with its principal offices at Tyler in Smith County, Texas, within the bounds of the District Court of the United States for the East-
4 ern District of Texas; that its president is J. M. Herbert who resides in St. Louis, Missouri, and that D. C. Dobbins, who resides at Tyler in Smith County, Texas, is its general superintendent.

This suit involves questions arising under the Constitution and laws of the United States and is a case in which a State is a proper party and in which the United States and officers thereof are defendants and the amount involved in the controversy as to each of the parties is in excess of three thousand dollars ($3,000) exclusive of interest and costs.

This is a suit to suspend and set aside an order of the Interstate Commerce Commission and is brought pursuant to the provisions of the Judicial Code of the United States and of the Act of October 23, 1913, (Chapter 32, 38 State L. 220), wherein the Commerce Court was abolished.

II.

The order which the petitioners seek to have suspended and set aside is an order made by the Interstate Commerce Commission on December 2, 1920, in Cause No. 1 A/c-1, finance docket No. 4, entitled, "In the Matter of the Application of the Eastern Texas Railroad Company for a Certificate of Convenience and Necessity." The copy of said order and the report of said Interstate Commerce Commission, filed in connection therewith, is hereto attached, marked Exhibit "A," and made a part of this petition.

The order herein referred to was made upon the petition of the Eastern Texas Railroad Company in which it was aided and assisted by the St. Louis Southwestern Railway Company of Texas and the St. Louis Southwestern Railway Company, each of which had their

residences at their respective general offices as hereinbefore alleged and the matters complained of in said petition of said carriers
5 before the Interstate Commerce Commission upon which the investigation was instituted by said Interstate Commerce Commission and in which said order in said Cause No. I A6-1 was made, arose in the Eastern District of Texas.

III.

Plaintiffs allege that the Eastern Texas Railroad Company did, on the 8th day of November, A. D. 1900, file its Articles of Association in the office of the Secretary of State of the State of Texas, and thereby and thereafter became and has continued to be a corporation under the laws of the State of Texas, and that its charter, which is hereto attached, marked Exhibit "B," together with all laws of the State of Texas, became the contract between the said railroads and the State of Texas, whereby, among other things, said railroad company bound and obligated itself to operate its line of railroad for a period of twenty-five years and until it should obtain consent of the State of Texas to abandon the operation of the trains of its line of railroad. That the name of said railroad corporation under said Articles, was and is, "Eastern Texas Railroad Company;" that it was a charter "for the purpose of constructing or maintaining and operating" a railroad from the town of Lufkin in Angelina County, State of Texas, to the City of Crockett in Houston County, Texas; and that in pursuance to said contract and charter the said railroad company did construct and operate trains upon its line of road from Lufkin in Angelina County, Texas, to Kennard in Houston County, Texas, and has continuously operated same in full recognition of its charter contract and of its obligations under the laws of the State of Texas existing at the time of the granting of its charter, and those that have been enacted by the Legislature of the State of Texas subsequent to said time in accordance with the Constitution of
6 the State of Texas.

It was declared that the corporation should begin to exist on the first day of November, 1900, and continue as a corporation for a period of twenty-five years therefrom. The amount of the Eastern Texas Railroad Company's capital stock as stated in its charter was $150,000.00; the names and places of residence of the several persons forming the corporation were R. H. Keith, Kansas City, Missouri; W. C. Perry, Kansas City, Missouri; John Perry, Kansas City, Missouri; J. C. Sherwood, Kansas City, Missouri; Chas. Campbell, Kansas City, Missouri; D. A. Nunn, Crockett, Texas; D. A. Nunn, Jr., Crockett, Texas; John Morrison, Texarkana, Texas; W. H. Carson, Texarkana, Texas; W. H. Welch, Texarkana, Texas. The names of its first Board of Directors were: W. H. Carson, Texarkana, Texas; W. H. Welch, Texarkana, Texas; D. A. Nunn and D. A. Nunn, Jr., Crockett, Texas; R. H. Keith, Kansas City, Missouri; W. C. Perry, Kansas City, Missouri; J. C. Sherwood, Kansas City, Missouri.

The government of the Eastern Texas Railroad Company in the management of its affairs, was vested by its charter in the Board of Directors, President, Vice-President, Secretary and Treasurer and a superintendent or manager. Its capital stock was divided into 1500 shares of the par value of $100.00 each.

Afterwards on the 20th day of February, 1901, the Eastern Texas Railroad Company filed an amendment to its charter, naming the counties through which its proposed line should run. Afterwards, on or about the 26th day of August, 1902, said railroad further amended its charter by increasing its capital stock from $150,000.00 to one million dollars. Thereafter, on or about the 28th day of November, 1910, it again amended its charter and changed
7 its general offices from the town of Kennard to the City of Lufkin in Angelina County. Said railroad by its act in becoming a corporation under the Constitution and laws of Texas, and by its several amendments thereof to its charter, became a corporation chartered under the Constitution and laws of Texas, with the rights and privileges granted railroad corporations by the Constitution and laws of the State of Texas, and became charged with all the burdens and liabilities imposed by such Constitution and laws. Its charter and the several amendments thereof, constitute an agreement and contract between said railroad company and the State of Texas for a period of twenty-five years from the 18th day of November, 1900, by reason of which it became and is obligated and bound to operate its trains on said line of railroad until the 8th day of November, 1925.

Said railroad company did operate and maintain its line of railroad as stated under the privileges and franchises received by it in accordance with its charter and the Constitution and laws of the State of Texas; it became obligated and bound to obey all of the constitutional statutes of the State of Texas and all lawful orders of the Railroad Commission of the State of Texas; each and all of the statutes of this State regulating railroads entered into and became a part of its charter contract, and were then and have since remained and are now binding upon said railroad company.

Among other obligations which the Eastern Texas Railroad Company accepted when it became a corporation was that it would not abandon, take up and remove its main line of railway without the consent of the Legislature of the State of Texas, which it has not obtained. It further obligates itself to continue to operate its trains
8 as provided for by the laws of Texas, and obey the lawful orders of the Railroad Commission of Texas. By virtue of its said charter contract with the State of Texas, said railroad company obtained the right to be a railroad corporation and common carrier of passengers and freight for hire, with the right to charge fares, freights and tolls for its services; and with the right to be protected in the exercise of these franchises and rights by the Constitution and laws of the State of Texas. Said railroad company, by reason of its charter, obtained the extraordinary right, privilege and franchise of eminent domain which it either did or could have exercised, and which it may yet exercise should it find

it necessary in carrying out its purposes as a chartered railway corporation under the Constitution and laws of this State. Said railroad company after having obtained its charter, proceeded to exercise the rights, privileges and franchises thereby granted to it by the State of Texas, and did construct its railroad, and for a period of approximately twenty years has operated same as a common carrier of freight and passengers for hire, and has collected large sums of money as a common carrier under and by virtue of the franchises, privileges and rights granted it by the Constitution and laws of Texas.

Among other privileges and rights required of said railroad company by virtue of its charter, was that of receiving donations of right-of-way upon which its line of railway should be constructed, and complainants allege that it did receive large and valuable donations of right-of-way from citizens and concerns along its line, to wit: about 50% of the right-of-way in Angelina County, and about 50% of the right-of-way in Trinity and Houston Counties, the same being donated by the citizens of these respective counties.

By virtue of its charter and franchises and privileges incident thereto, the Eastern Texas Railroad Company obtained the
9 privilege of serving a large territory with a large population, and receiving tolls and charges incident to its business from this territory. That there were and are a number of cities, towns and villages of 200 population or more within twenty miles of said line of railroad, among which may be named Apple Springs in Trinity County, Diboll in Angelina County, Alto in Cherokee County, Crockett in Houston County, and Wells in Cherokee County; that the towns on the line are Lufkin in Angelina County, population 5,000; Chaney in Angelina County, population of less than 100; Ratcliff in Houston County, population of 900; Kennard in Houston County, population of 1,200; that said railroad was and is the only railroad at any of the last four named towns except at Lufkin, but at Lufkin there are five other railroads to wit: The St. Louis Southwestern Railway Company of Texas; Angelina and Neches River Railroad; Groveton, Lufkin and Northern Railroad; Texas Southeastern Railroad and Houston East and West Texas Railway.

Complainant alleges that the Eastern Texas Railroad Company enjoyed the right of interchange of traffic with the railroads under a guarantee to it by the Constitution and laws of the State of Texas which became effective upon the filing of its charter and was and is one of the franchise privileges thereunder.

IV.

Complainant alleges that on or about August 28, 1906, the Eastern Texas Railroad Company sold its net current assets amounting to $24,601.49, and its rolling stock having a book value of $70,000.00 to the Louisiana and Texas Lumber Company. That on September 1, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation and one of the defendants herein, acquired the entire

capital stock of the Eastern Texas Railroad Company and still owns same except qualifying shares owned by its Board of Directors.

That since its capital stock was so acquired by the said Missouri corporation, the Eastern Texas Railroad Company has ceased to have or exercise any will or purpose of management of its own, but all of its activities as a common carrier have been merged with and become a part of the system of railways in Texas controlled by the St. Louis Southwestern Railway Company, the Missouri corporation, either directly or indirectly through a subsidiary of the last named company, to wit: The St. Louis Southwestern Railway Company of Texas.

J. M. Herbert is president of and a member of the Board of Directors of the three railway companies named as defendants herein; F. W. Green is vice-president and a director of the said named three defendant railway companies; G. K. Warren is secretary of the St. Louis Southwestern Railway Company (of Missouri) and assistant secretary and treasurer of the St. Louis Southwestern Railway Company of Texas and of the Eastern Texas Railway Company; D. C. Dobbins is superintendent of the St. Louis Southwestern Railway Company of Texas and of the Eastern Texas Railroad Company and the Auditing Department of the Eastern Texas Railroad Company is done under arrangement by the Auditing Department of the St. Louis Southwestern Railway Company of Texas.

At the time of the entering of the order by the Interstate Commerce Commission and long prior thereto, the employees operating trains, repairing tracks, as well as bridge gang and all other employees of the Eastern Texas Railroad Company were employed by, paid and discharged by the St. Louis Southwestern Railway Company of Texas, and in the operation of the Eastern Texas Railroad Company, it has for a long period of time been treated in every respect as a part of the line of the St. Louis Southwestern Railway

11 Company of Texas, under the same management in every respect and as owned by the St. Louis Southwestern Railway Company (of Missouri). The St. Louis Southwestern Railway Company (of Missouri) owns, controls and operates approximately 810.5 miles of railroad in Texas, including the mileage of the Eastern Texas Railroad Company. The St. Louis Southwestern Railway Company (of Missouri) owns, controls and operates approximately 1,753.83 miles of railroad in the United States, including the 810.5 miles of railroad in Texas above referred to. The mileage of the Eastern Texas Railroad Company constitutes only an insignificant portion of the total mileage of the St. Louis Southwestern Railway Company of Texas, and still smaller portion of the total mileage of the St. Louis Southwestern Railway Company (of Missouri), and the revenues or losses derived from the operation of the line designated in the charter of the Eastern Texas Railroad Company constitute only an insignificant portion of the revenue or losses derived from or incurred by the St. Louis Southwestern Railway Company of Texas or the system of railroads known as the St. Louis Southwestern Railway Company (of Missouri).

V.

Complainants further allege that during the period of the existence of the Eastern Texas Railroad Company and down to and including the year 1917, it was able to earn and did earn and receive a substantial corporate income in excess of its expenses, and that had such net corporate income been properly applied or expended, or any substantial amount thereof been properly applied or expended in the upkeep and betterment of its line of road, said line of road would not require the unusual and extraordinary expenditures alleged in its application herein set out and found to be a fact by the
12 Interstate Commerce Commission. On the contrary, complainants allege that since the acquisition of stock of the said railroad company by the St. Louis Southwestern Railway Company and up to about August 4, 1920, there had been expended on additions and betterments of the said line of railroad the approximate sum of only $3,793.40, and in equipment the approximate sum of $2,186.76, making the total expenditure for additions, betterments and equipments of approximately $5,980.16.

VI.

Complainants further allege that if the Eastern Texas Railroad Company or the company or companies operating it have suffered any extraordinary decrease in revenue since 1917, that said decrease was due, as these defendants believe and allege, to its management under Federal control and to conditions brought about by the war, and to the fact that since the close of the war the country has been going through a period of reconstruction. That within a reasonable time and with restoration in normal conditions, its revenues will, with the exercise of proper diligence on the part of the Eastern Texas Railroad Company, again be sufficient to meet all its proper and necessary expenses, and complainants further allege that if said railroad company has been operated at any extraordinary increase of expense, then such increase was due to the war and conditions prevailing during the period of reconstruction, and that with the return of normal conditions its expenses can with the proper management be materially reduced. The mere fact that said railroad company has not for a time, if such be true, been operated at a profit, such fact is not sufficient reason in law, either under the Fourteenth Amendment to the Constitution of the United States or under the Transportation Act of 1920 for permitting the abandonment of said line of railroad and the discontinuance of operation of same
13 contrary to the laws of the State of Texas and to its charter contract.

VII.

In this connection, complainants allege that the Eastern Texas Railroad Company has no bonded indebtedness of any kind or character. That it has ample assets to secure funds to carry forth its

operation as a common carrier until the same can be operated at a profit, if in fact it was not doing so at the time of the order complained of herein; and it is further alleged that by reason of its ownership by the St. Louis Southwestern Railway Company (of Missouri) and its consolidation with the St. Louis Southwestern Railway Company of Texas, the Eastern Texas Railroad Company and its management being identical with the roads above named, can obtain sufficient funds to carry it over the present crisis in its financial affairs, if any such crisis exists, which is not admitted.

VIII.

Complainants allege, however, that notwithstanding the fact that the stock of the Eastern Texas Railroad Company has become the property of the St. Louis Southwestern Railway Company (of Missouri) and notwithstanding the fact that it has become consolidated with the St. Louis Southwestern Railway Company of Texas, and has become a part of the system of railroads owned and controlled by the St. Louis Southwestern Railway Company (of Missouri) still all the charter obligations and all the statutory obligations resting upon the Texas corporation in the first instance are lasting and binding obligations on it and as to its operation upon the lines with which it has been consolidated.

14 IX.

Complainants allege that prior to the 29th day of December, 1845, all the territory comprising the State of Texas existed as an independent nation of the world known as the Republic of Texas. That as such it had all power over its internal and domestic affairs as well as its foreign affairs, with the right to pass and enforce any and all laws which an independent nation could enact and enforce for the welfare of its people. That it had a constitution and code of laws, with a republican form of government, similar to the constitution and laws of the United States. That on said date it was admitted into the Union as one of the States of the United States and ceased to exist as an independent nation of the world, but became one and has since continuously been a State of the United States. That it was admitted into the Union on equality will all other States of the Union in all respects whatsoever except that it retained the ownership of and ever thereafter continued to own all public lands within its borders. That upon admission to the Union it obtained the same rights and powers of government, legislative, executive, and judicial, over its internal affairs as was retained by and reserved to the several States of the Union.

X.

Complainants are advised, and therefore aver that the Constitution of the United States does not delegate to the National Government any power of police, nor power of legislation with respect to the internal affairs and intrastate commerce of the State of Texas, nor

are said powers prohibited by the Constitution to the State of Texas, but are specially reserved to said State, or to the people, according to the determination of the people of said State.

Complainants are advised, and therefore aver, that in addition to the rights, powers and authority specially or by necessary
15 implication reserved to or retained by the States, or the people, and not granted to the United States by the Constitution and various amendments thereto, there was reserved to the States respectively, or to the people, "all powers not granted to the United States by the Constitution nor prohibited to it by the States." That among these powers were the right to regulate intrastate commerce, and all rates, fares, wages, charges, and contracts relative thereto, entered into or made effective within any State; the right to regulate private corporations, and combinations and monopolies in restraint of trade and commerce in intrastate commerce; and various powers, rights and privileges of the States and of the people not necessary to be *enumerated* at this time. That all of these powers thus reserved to the several States were and are denied to the United States by the Constitution.

XI.

That acting within and under the Constitution of the United States, the State of Texas, from the time of its admission into the Union down to the present time, has by its several Constitutions and various statutes exercised the powers thus reserved to it, or left to the people the right to exercise the powers thus reserved to them. That its present Constitution was adopted by the people and became effective in 1876, and, with certain amendments thereafter made, became, was and is the fundamental law of the State, all provisions of which are valid under the Constitution of the United States. That under its said Constitution, Texas has from time to time enacted statutes for carrying into effect the provisions thereof and protecting the rights and liberties therein granted to or retained by the people, all of which are valid under the Constitution of the United States.

That among the constitutional provisions referred to are
16 those relating to equal rights, due process, special privileges and franchises, perpetuities and monopolies, private corporations, common carriers and railways.

Section 3, Article 1 of the Constitution of Texas declares that all men have equal rights and that no man or set of men is entitled to exclusive, separate public emoluments or privileges.

Section 17 of Article 1 provides that no irrevocable or uncontrollable guarantee of privileges shall be made, but all privileges and franchises granted by the Legislature or granted under its authority shall be subject to the control thereof.

Section 19 of Article 1 declares that no citizen shall be deprived of life, liberty, property, privileges or immunities except by due course of the law of the land.

Section 22 of Article 4 makes it the duty of the Attorney General of the State to especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take

such actions in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freights or wharfage not authorized by law, and upon sufficient cause to seek a judicial forfeiture of such charter unless otherwise especially directed by law.

Article 10 of the Constitution of Texas, relates exclusively to railroad corporations. Section 1 of this article declares that any railroad corporation organized under the law for the purpose, shall have the right to construct and operate a railroad between any points in the State and to connect at the State line with railroads of other States. It povides that every railroad shall have the right to
17 intersect, connect with or cross any other railroad, and that they shall receive and transport each other's passengers, tonnage and cars loaded or empty, without delay or discrimination and under such regulation as shall be prescribed by law.

Section 2 of this Article states that railroads theretofore constructed and which might thereafter be constructed in this State are declared to be public highways and railroad companies common carriers. It makes it the duty of the Legislature to pass laws to regulate freight and passenger tariffs; to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by adequate penalties. It further provides that in the further accomplishment of these objects and purposes, the Legislature may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable.

Section 3 of this Article requires every railroad corporation doing business in the State under the laws or authority thereof, to have and maintain a public office or place within the State for the transaction of its business, where transfers of stock shall be made and where shall be kept for inspection by the stockholders of such corporation, books, in which shall be recorded the amount of capital stock prescribed, the names of the owners of the stock, and the amounts owned by them respectively, the amount of stock paid, and by whom, the transfer of such stock, and the date of the transfer, the amount of its assets and liabilities, and the names and places of residence of its officers. This Section provides for an annual
18 meeting within the State of the directors of every railroad company, and makes it the duty of certain officers of the corporation to make reports to certain State officers, the reports to include such matters relating to the railroads as may be prescribed by law. It is made the duty of the Legislature to pass laws enforcing the provisions of this Section by suitable penalties.

Section 4 of this Article fixes the status of movable property of railroad companies, as personal property makes it liable to execution, etc.

Section 5 of this Article declares that no railroad corporation or the lessees, purchasers, managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation, with, or lease or purchase the works or franchises of, or in any way control any railroad corporation owning or having under its con-

trol a parallel or competing line. It prohibits any officer of any such railroad corporation from acting as an officer of any other railroad corporation owning or having control of a parallel or competing line.

Section 8 declares that no railroad corporation in existence at the time of the adoption of this constitution shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution applicable to railroads.

Section 9 requires that railroads passing within a distance of three miles of any county seat shall pass through the same and to establish and maintain a depot therein, etc.

Article 12 of the Constitution of Texas relates to private corporations. Section 1 prohibits the creation of private corporations except by general law. Section 2 provides that general laws
19 shall be enacted providing for the creation of private corporations, which shall provide fully for the adequate protection of the public and of the individual stockholders. Section 3 provides the right to authorize and regulate freights, tolls, wharfage or fares levied and collected or proposed to be collected or proposed to be levied and collected by individuals, companies or corporations for the use of highways, landings, wharves, bridges and ferries devoted to public use, has never been and shall never be relinquished or abandoned by the State, but shall always be under legislative control and dependent upon legislative authority.

Section 4 makes it the duty of the Legislature to provide a mode of procedure by the Attorney General and District or County Attorneys in the name and behalf of the State to prevent and punish the demanding and receiving or collection of any and all charges as freight, wharfage, fares, or tolls for the use of property devoted to the public, unless the same shall have been especially authorized by law.

Section 5 provides that all laws granting the right to demand and collect freights, fares, tolls or wharfage shall at all times be subject to amendment, modification or repeal by the Legislature.

Section 6 provides that no corporation shall issue stock or bonds except for money paid, labor done or property actually received and declares that all fictitious increase of stock or indebtedness shall be void.

Section 25 of Article 16, provides that all drawbacks and rebatement of freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service of, or to any cotton, grain or other produce or articles of commerce
in this State, paid or allowed or contracted for to any com-
20 mon carrier, shipper, etc., not the true and absolute owner thereof, are forever prohibited and it shall be the duty of the Legislature to pass effective laws, punishing all persons in this State who pay, receive or contract for or respecting the same.

Section 48 of Article 16 preserved all laws in effect in the State of Texas when the Constitution of 1876 was adopted and which were not repugnant to the Constitution or that of the United States.

until such laws shall expire by their own limitation or be amended or repealed by the Legislature.

That under its Constitution, and particularly under the foregoing sections thereof, the State of Texas has enacted a full and complete code of laws relating to railroads and common carriers, corporations, trusts and monopolies.

XII.

Title 115 of the Revised Civil Statutes of Texas (1911) with amendments thereto relates to the subject of railroads. Chapter one of this title relates to the incorporation of railroad companies. It contains no limitations as to the time, place, necessity for, or circumstances under which a railroad may be constructed. Any ten or more persons who are subscribers to the stock may form such a corporation by complying with the terms of this Chapter. (R. S. Art. 6405.)

No corporation, except one chartered under the laws of Texas is permitted to construct, build, operate, acquire, own or maintain any railway within the State. (R. S. Art. 6406.)

This Chapter prescribes the method of incorporation, states when the existence of such a corporation begins, and limits the period of its existence to fifty years. Provision is made, however, for the renewal of corporations whose charters have expired. (R. S. Arts. 6407 to 6416.)

Chapter 2 of this Title authorizes amendments to railway corporation charters, and prescribes the manner thereof. (R. S. Arts. 6417 to 6422.)

21 Government.

Chapters four, five, six and seven of this Title relate to the government of railway corporations by the stockholders, directors and officers.

Each director is required to be a stockholder, and a majority must be residents of the State of Texas. (R. S. Arts. 6439.)

The corporate powers of the corporation are vested in the directors. (R. S. Art. 6445.)

The various duties of the directors, and the rights and privileges of stockholders are defined. (R. S. Arts. 6438 to 6480.)

The funds of the corporation can only be used for its corporate purposes. (R. S. 6457.)

Fully paid stock is non-assessable. (R. S. Art. 6458.)

Authority is conferred upon stockholders to fix the amount of loans which railway corporations may negotiate, fix the rate of interest, and provide the security therefor. (R. S. Art. 6468.)

Railroad stock in bonds can not issue except for money, labor or property actually received, and applied to corporate purposes. Shares of stock can not issue except at par value. (R. S. Art. 6469.)

Fictitious dividends, and other fictitious increase of capital stock or indebtedness is prohibited under penalty. (R. S. Arts. 6470, 6471.)

Chapter eight relates to the right of way of railway corporations, the right thereto, the amount thereof, methods of acquirement, including the right of eminent domain, and generally all regulations relative to the subject. (R. S. Arts. 6481 to 6534.)

22 Railroad corporations, in accordance with the Constitutional provision, are authorized to construct and operate their lines between points within the State, and to connect at the State line with railroads of other states. (R. S. Art. 6481.)

Railroads are granted the right of way over all public lands, together with the right to use any material found upon such land necessary to the construction and operation of their road. (R. S. Art. 6482.)

The beds of all streams in Texas exceeding thirty feet in length are the property of the State and were from the beginning reserved from survey. (Acts of Congress of the Republic of Texas, December 14, 1837. R. S. of Texas, 1879, Art. 3911 R. S. 1895, Art. 4147, and R. S. 1911, Art. 5338.) However, railroad corporations are given the right to construct their lines across, along or upon any stream, water course, highway, or canal of the State. (R. S. Art. 6485.)

Railway corporations are authorized to intersect, join and unite their lines with any other railway line. (R. S. Art. 6499.)

In the acquirement of necessary lands and material for its use railway corporations, if an agreement therefor can not be made with the owner, are given full and complete power of eminent domain. (R. S. Arts. 6502 to 6534.)

Chapter three of this Title relates to the public officers and books of railroad corporations. The general offices of such companies are required to be kept in the State. (R. S. Arts. 6423.)

The statute names or defines their officers who shall maintain their offices at the place designated for the general office of the company. (R. S. Art. 6424.) It provides what books must be kept open for the inspection of stockholders, any officer or agent of the State charged with the duty of inspecting them, and for

23 examination by the Legislature. (R. S. Arts. 6429, 6431 and 6432.) Suits are authorized and penalties provided to secure compliance with these articles of the statute. (Arts. 6433, 6434.)

Railway corporations are prohibited from changing the location of their general offices, machine shops or round houses, except with the consent of the Railroad Commission of Texas. (Art. 6435.)

Chapter nine defines various rights and duties of railway corporations. It grants to them the right to have a seal, the power of succession, and the right to sue and be sued, plead and be impleaded. (R. S. Arts. 6535, 6536.)

They are given the power to purchase real and other property, or receive grants of the same, and to convey such property. (R. S. Arts. 6537, 6438.)

They are given the right to erect buildings, stations, fixtures and machinery, to receive and convey persons and property by force of steam or other mechanical power, and in substance to do anything

appropriate or necessary to carry out their corporate purpose. (R. S. Arts. 6541, 6542, 6543.)

They are authorized to borrow money, execute mortgages, and issue and dispose of bonds, subject to the provisions of the statutes. (R. S. Arts. 6544 to 6547.)

In certain instances railroad corporations may abandon, change or re-locate any portions of its line or road, and in the exercise of such authority is granted the power of eminent domain, if necessary. (Arts. Texas Legislature 4th Called Session, Chap. 27, Vernon's Complete Texas Statutes, Arts. 6548*a* to 6548*e* inclusive.)

Chapter ten prescribes the duties and liabilities of Railroad Corporations. Part of these requirements are that trains shall be run for transportation of passengers and freight; that railway corporations shall receive, transport and deliver passengers and freight upon the payment of the legal fares, rates or charges. Such corpo-
24 rations are prohibited under penalty from refusing to do so, or from abandoning the operation of their trains, or from abandoning their roads or any part thereof, or failing to resume the operation of their lines when ordered to operate them by the State Railroad Commission. (R. S. Art. 6552.)

This article, however, does not apply to roads to which the right of eminent domain is not granted by the laws of the State. (R. S. Art. 6552*a*, Vernon's Complete Texas Statutes.)

This chapter contains various regulatory provisions regulating the operation of railways, many of which it does not appear necessary to specifically mention, though they are a portion of the Code of laws of Texas governing railway corporations.

Railroad corporations are required to receive freight and passengers from connecting lines upon terms defined by the statute. (R. S. Arts. 6608, to 6617.)

XIV.

Chapter Eleven relates to the collection of debts from railroad corporations, to wages of employees, and prohibits the abandonment of the main track of any railroad when once constructed and operated.

Persons in the employ of railroad companies are entitled to thirty days' notice before a reduction in wages may take effect. The Statute provides that the property and franchises of a railroad corporation may be sold for its debts, but certain liabilities are required to be assumed by its purchasers or successors. (R. S. Arts. 6619 to 6625.)

Chapter twelve relates to the forfeiture of the charters of railway companies which do not comply therewith by constructing their lines, together with various relief measures exacted, from time to time, with respect thereto. (Vernon's Complete Texas Statutes. Arts. 6635 to 6636.)

25 Chapter thirteen defines the authority and duties of Railway ticket agents. (R. S. Arts. 6637 to 6639.)

Chapter fourteen fixes the liability of railroad companies for injuries to their employees. (R. S. Arts. 6640 to 6652.)

XIV.

Chapters fifteen and sixteen are the Railroad Commission Act of the State of Texas. It creates a railroad commission, defines its membership, and the various powers and duties of the Commission. In effect the Commission is authorized to adopt all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs, correct abuses, and prevent unjust discrimination, and to enforce the penalties prescribed by the chapter. The manner and method by which the Commission is to exercise the power conferred upon it is fully set forth in the statute. The power conferred upon the State Commission is in many respects similar to that conferred upon the Interstate Commerce Commission, and generally upon State railway and public utility Commissions throughout the United States, and we deem it unnecessary to plead it in detail. Among other subjects placed under the jurisdiction of the Commission is the issuance of stocks and bonds by railroad corporations. The Jurisdiction of the Commission over this subject is complete. The statute, which was enacted in 1893, declares that the power and authority of issuing or executing bonds, or other evidences of debt, and all kinds of stock and shares thereof, and the execution of all liens, and mortgages by railroad corporations in the State are special privileges and franchises, the right of supervision, regulation, restriction, and control of which has always been, is now, and shall continue to be vested in the State government, to be exercised according to the provisions of this and other laws. (R. S. Art. 6717.)

26 Bonds can not be issued in excess of the reasonable value of the property, except in certain emergencies. (R. S. Art. 6718.) The method and manner of issuing stock and bonds is fully set forth in the statutes, and we refer the court thereto for the details thereof.

In addition to the foregoing, Title 20, Articles 707 to 732, inclusive, of the Revised Civil Statutes of this State, defines the duties and liabilities of common carriers. Title 18, Chapters 14 to 21, of the Revised Penal Code of this State creates and defines offences relating to railways, their management, and operation and prescribes punishment therefor.

The State has, also, a complete code of general corporation laws, many provisions of which apply to railways, union depot, and telegraph corporations.

In addition to various penalties and remedies set forth in the statutes relating to railways, the general laws of the State providing for suits by information in the nature of a quo warranto.

XV.

Complainants aver the State of Texas is within all the protective clauses of the Constitution of the United States, and has reserved to it all legislative, executive and judicial powers which were respec-

tively reserved to the State at the time of the formation of the government of the United States and the adoption of its Constitution.

That among other rights so reserved to the several States of the Union and to the State of Texas, was that permitting them to create and control private corporations and particularly private corporations engaged in the business of common carriers, the property of which lies wholly within the State. That the government of
27 the United States and the Congress, which is its agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing them to determine any justiciable question where the rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign state or the United States can only be determined under the Constitution of the United States, particularly under Article 3, Section 2, and the Eleventh Amendment to the Constitution of the United States, in the Supreme Court of the United States; and cannot be determined before any other court nor before any legislative body or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas, no citizen of any other State, and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas; and that such consent has not been granted by the State of Texas.

XVI.

Notwithstanding the aforesaid constitutional provisions, the Interstate Commerce Commission Act, as amended by Section 402 of the Transportation Act of 1920, was passed in violation thereof and particularly are subdivisions 18, 19, 20, 21 and 22 of said Section 402 being the sections by authority of which the Interstate Commerce Commission acted in granting the order complained of herein, in violation of the Constitution of the United States and particularly of the provisions herein above set out.

28 These subdivisions of this Section prohibit any carrier from making an extension of its line of railroad, from constructing a new line of railroads, or acquiring or operating any line of railroad or extension thereof, or engaging in transportation over or by means of any additional or extended line of railroad, until the carrier shall have first obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require the construction or operation of such additional or extended line of railroad; carriers by railroad are likewise prohibited from abandoning all or any portion of a line of railroad or the operation thereof until there shall first have been obtained from the Commission a certificate that the present or future

public convenience and necessity permit of such abandonment. The application for and issuance of such certificates are to be under such rules and regulations as to hearings and other matters as the Commission may prescribe. Upon receipt of an application for such certificate, the Commission is required to give notices thereof, and file a copy with the Governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated on all or any portion of a line of railroad, or the operation thereof which is proposed shall be abandoned.

The right of being heard is given by the Act in the same manner that hearings are provided for upon complaints or the issuance of securities. The Commission is given power to issue such certificates as are prayed for, or to refuse, or to issue for a portion of a line of railroads or extension thereof, etc. The Act declares, "from and after issuance of such certificate, and not before, the carrier by railroad, may, without securing approval other than such certificate, comply with the terms and conditions contained or attached to the issuance of such certificate and proceed with the construction,
29 operation or abandonment covered thereby."

XVII.

As heretofore shown, the State has a complete system of laws for chartering, regulating, and controlling railroad corporations.

These laws prohibit such corporations from abandoning the operation of their trains, and from taking up and removing their main tracks when once constructed and operated; except, as under actual practice, the Legislature grants consent, or except under conditions named in the statutes, the Railroad Commission of Texas consents thereto.

That the substance and effect of these paragraphs of the Transportation Act are to authorize a carrier to bring an action before the Interstate Commerce Commission against the State and all other interested parties, for the purpose of obtaining a decree authorizing the complaining carrier to abandon all or any portion of its line of railroad, or the operation thereof; that said Act in effect provides for the service of a subpœna or notice on the public and on the State involved by delivery of a copy thereof to the Governor of the State with the right of such state to be heard; that said Act purports to give the Interstate Commerce Commission the right to hear such application and the pleadings and evidence of the parties, including that of the State, and to issue a decree granting to the complaining carrier the right to abandon all or any portion of its lines of railroad or the operation thereof. That said Act purports to confer authority upon the Interstate Commerce Commission to grant such certificate of abandonment and the Railroad Company to carry into effect the terms of the same without securing the approval of the state or any of its agencies or authorities. That the legal effect of said statute is to authorize the Interstate Commerce Commission to adjudicate:

30 (*a*) That such complaining railroad has complied completely as to time and effect with its charter contract with the State which chartered same;

(*b*) Or that the State has violated the terms of its charter contract in such manner and form and under such circumstances as would authorize the carrier to no longer abide by and within the same;

(*c*) Or that the financial condition of the road is such and all the facts and circumstances which surround it are such, that it is not able longer to comply and ought not in law be required to comply with its charter contract with the State and the laws and regulations governing its operation;

(*d*) Or that to further comply with its charter contract with the State and abide by the laws made for its regulation, would be to take the property of such carrier without due process of law;

(*e*) Or that for the carrier to longer comply with such charter contract and the laws governing its existence and operation would be confiscatory and unreasonable;

(*f*) Or that for the carrier to longer abide by its charter contract and the laws of the State governing its existence constitutes a burden on interstate commerce;

(*g*) Or that other facts exist which authorize the corporation to abandon and take up its line of railroad or to abandon the operation of the same.

That each and all of the issues hereinabove suggested and which may be determined by the Interstate Commerce Commission and all such issues which it is contemplated may be determined by the Interstate Commerce Commission, whether here enumerated or not, are each and all justiciable issues between the State of Texas and the complaining carrier, or present questions for determination by the legislative department of the State.

31 XVIII.

Upon advice complainant alleges, that, notwithstanding these averments, the Transportation Act of 1920, in the sections heretofore referred to, pretends to confer authority upon the railway corporations of Texas to cease the operation of their lines, and to take up and remove their main line tracks without the consent of the Legislature of the State of Texas or the Railroad Commission of the State of Texas, and in violation of the Constitution and laws of Texas; that said sections of the Transportation Act, therefore, as to railroad corporations created by the State of Texas, are unconstitutional and void because they are violative of the Constitution of the United States, and particularly of the following provisions, to-wit:

(*a*) They violate the Tenth Amendment to the Constitution reserving to the states and the people all power not granted to the United States nor prohibited to the states;

(*b*) They violate subdivision 3, Section 8, Article 1, of the Constitution limiting the authority of Congress to the regulation of interstate and foreign commerce;

(*c*) They violate the Eleventh Amendment to the Constitution prohibiting suits against the state;

(*d*) Said sections violate sections 1 and 2 of Article 3, of the Constitution conferring exclusive jurisdiction over justiciable controversies upon the supreme court and inferior courts of the United States;

(*e*) That said sections violate the Fifth Amendment to the Constitution which prohibits the taking of property without due process of law.

That said sections of the Transportation Act, 1920, in so far as the same provides that railroads cannot be constructed nor extensions made of existing roads without the consent of the Interstate Commerce Commission as provided for in said sections, is likewise unconstitutional and void because violative of each and all of the foregoing provisions of the Constitution of the United States; and
32 particularly for the reason that such power and authority is not conferred upon the Congress, nor upon the Interstate Commerce Commission, by subdivision 3, Section 8, Article 1, of the Constitution of the United States, giving Congress the power to regulate interstate commerce; and particularly for the reason that the Tenth Amendment to the Constitution of the United States reserves to the people the power and authority to engage in lawful occupations, and of the Fifth Amendment to the Constitution, which prescribes that one may not be deprived of liberty or property without due process and particularly for the reason that the Constitution of the United States reserves to the several States and to the State of Texas, the right to create and control private corporations and particularly private corporations engaged in the business of common carriers, the property of which lies wholly within the State creating same.

XIX.

Complainants aver that the right exercised by the Interstate Commerce Commission in granting the Certificate of Public Convenience and Necessity herein complained of, claimed by them under Subdivisions 19 to 22 of Section 402, are in violation of the Constitution of the United States and of the various sections thereof as herein set out, and they are contrary to and usurp the powers reserved to the State of Texas, and effectively destroy the contract between the Eastern Texas Railroad Company, and the obligations which the other railroad companies named defendants herein assume between

said railroad company and the State of Texas as specified in its charter and as fully set out in the Constitution and Laws of the State of Texas as herein alleged, and in this connection complainants aver that the exercise of such power of the Interstate Commerce Commission destroys all of the rights of the State of Texas to control the corporation created by it, and destroys all of the laws of the State of Texas regulating common carriers, those pleaded
33 and mentioned herein, as well as all other laws in any way affecting and regulating railroads within the State of Texas, whether properly passed under the police powers of the State or not.

XX.

Complainants further aver that the Eastern Texas Railroad Company obtained its charter, its right to be a corporation, and all the franchises, rights, profits and emoluments incident thereto from the State of Texas upon condition that it should accept as the law governing it, the Constitution of the State of Texas, and it agreed to abide by same. Among the obligations assumed by the Eastern Texas Railroad was that it would not take up and remove the main line track without the consent of the Legislature of the State of Texas and the lawful orders of the Railroad Commission of Texas made for such purpose.

Notwithstanding all of the aforesaid, complainants aver that on or about the third day of June, 1920, the Eastern Texas Railroad Company, acting by and through the officers, directors and attorneys of the St. Louis, Southwestern Railway Company and the St. Louis, Southwestern Railway Company of Texas, who, in fact, own and control the Eastern Texas Railroad Company, as herein above alleged, brought an action by filing an application or petition with the Interstate Commerce Commission against the State of Texas and against the public in the manner and form contemplated by the aforesaid unconstitutional Act of Congress for the purpose of having annulled by the Interstate Commerce Commission its charter contract and all its obligations to the State of Texas, and that the public, so far as continuing its line of railway and the operation of trains thereon was concerned, and for the purpose of securing the right to abandon its entire line of railway, to dismantle same and cease operation of its trains; that there was then published a notice of said application in the name of the Eastern Texas Railroad Company as is required by the unconstitutional Act, and the State of Texas was summoned and cited in effect as in suit at law or equity to ap-
34 pear before the Interstate Commerce Commission as a court and citation or subpœna were delivered to the Governor of Texas, such pretended citation or subpœna being issued under the authority of the Interstate Commerce Commission.

That the said Interstate Commerce Commission, assuming that said unconstitutional Act of Congress was law, proceeded to have testimony taken and a hearing of the subject matter of said complaint; that neither the State of Texas nor its officers and agents ap-

peared at the taking of such testimony or at such hearing, or took any part in such unconstitutional and unlawful proceeding. That notwithstanding these facts and notwithstanding the unconstitutional and void character of this pretended law, and notwithstanding that the State of Texas is protected by the Eleventh Amendment to the Constitution and by the Fourteenth Amendment to the Constitution which protects the contract alleged of the State of Texas with the Eastern Texas Railroad Company, still, nevertheless the Interstate Commerce Commission, did, on the Second day of December, A. D. 1920, enter a judgment and decree which it denominates "Certificate of Public Convenience and Necessity" in favor of said Railroad Company and those acting with it named as defendants herein in which decree the said Interstate Commerce Commission found, in legal effect, that the State of Texas had been duly cited or subpenaed, and upon this subject the Commission, in its Certificate, recited:

"Upon receipt of such application, the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas."

That said Commission found and concluded in law, upon its own adjudication, that it had given due notice to all parties interested; and it had given a hearing upon application of plaintiff at which all parties in interest were given an opportunity to appear and be heard in the premises.

Complainants aver that in said Certificate or decree referred to, the said Interstate Commerce Commission finds, adjudges and decrees that the present Public Convenience and Necessity permits of the abandonment of all lines of the Eastern Texas Railroad Com-
35 pany, and it declares in said decree that:

"It is therefore ordered that the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all the property of said Company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated."

A copy of said order in full is attached hereto as Exhibit "A," and is here referred to.

XXI.

Complainants allege that the Certificate of Public Convenience and Necessity ordered and decreed by the Interstate Commerce Commission authorizing and directing the Eastern Texas Railroad Company to abandon operation of its trains and dismantle and dispose of its railway was:

(*a*) Beyond the power which it could constitutionally exercise;

(*b*) Beyond its statutory power;

(*c*) Confiscatory of the contract rights of the State of Texas embraced within the charter of the Eastern Texas Railroad Company and the several statutes and the Constitution of the State of Texas which constitutes a part of the same, and in violation of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law, and in violation of the rights reserved to the States, and to the State of Texas by the Constitution of the United States and the several Amendments thereof;

(*d*) That the granting of such certificate was without evidence, or without sufficient evidence to support the same and was arbitrary and unjust and contrary to the true facts and conditions existing
36 as will be hereafter more fully set out. That the Commission in granting the same exercised its authority in such an unreasonable manner that the granting of said Certificate was and is void;

(*e*) That the granting of such Certificate was against the evidence before the Commission and was and is contrary to the actual facts as found and reported by the Commission itself, although said findings of fact are more restrictive and more favorable to the order than the evidence would warrant and more favorable than the report of the engineer and examiner employed by the Commission who went upon the ground and in the adjacent country and reported the facts as they found them; that for all of these reasons, as well as all others alleged herein, the said Certificate of Public Convenience and Necessity is null and void and should be so held by this Court.

XXII.

Complainants allege, in connection with the foregoing paragraph, that the Eastern Texas Railroad Company is located in and passes through a very fertile region of East Texas; that at the time it was built the country it served was covered by large pine trees which have since been cut out to a great extent and sawed into timber and shipped over said Railroad; that at the present time much of this territory has been converted, and is being converted, into farm lands and highly improved; that substantial farm homes and modern school houses have been and are being built and inhabitants are engaged in raising cotton, corn, cane, melons, and other products extensively, and are also raising a high grade of cattle, hogs, and other domestic animals for shipment, all of which is making the country prosperous and is attracting settlers; that the smaller strips of timber re-
37 maining are being sawed into lumber and will be sawed into lumber if said Railroad Company is compelled to operate its train and furnish shipping facilities; and that from the "cut over" land, which is being cleared and put in cultivation, there is and was at the time of the issuance of the Certificate, a large production of ties and cord wood which will furnish the said Railroad Company freight for shipping through the winter and summer when cotton and other farm products are being moved in smaller quantities,

thereby giving to it continued patronage of freight; and that such products as herein enumerated are of such magnitude, and, if not will soon be, as to pay the necessary operating expenses and yield the defendant Railroad Company and its owners and managers a substantial and reasonable corporate income; that on the line of said Railroad and adjacent to it are gins, mills, banks, mercantile establishments and other industries incident to the highly developed and civilized country which do and will contribute to the furnishing of said Railroad Company a permanent source of revenue guaranteeing the continued prosperity and development of the community it was designed to serve and which it contracted to serve, all of which facts were known to the Interstate Commerce Commission, or could have been known to it by a proper investigation of the application and much of which was called to its attention by the examiner and engineer who made the investigation and reported under said Commission's direction. But, notwithstanding all of these facts and notwithstanding the reports of the examiner and engineer assigned to the investigation, the Interstate Commerce Commission made the order and decree granting the Certificate of Public Convenience and Necessity authorizing and directing the abandonment of the line of Railroad known as the Eastern Texas Railroad contrary to the facts and the law and arbitrarily without reason either in fact or in law.

38 XXIII.

Complainants aver that unless relief be granted by this Honorable Court and the Interstate Commerce Commission restrained from making other and further orders in the premises, and unless the defendant Railroad Companies be restrained from taking further action and proceeding with the abandonment and dismantling of said line of Railroad, the Interstate Commerce Commission will issue orders directing that the same be done and the defendant Railroad Companies conspiring together through their directors, officers and attorneys will proceed to abandon said Railroad and dismantle and dispose of same, and, in this connection complainants allege that said Railroad Companies, acting under the authority of the Interstate Commerce Commission, and by reason of the null and void order herein complained of, have ceased operation of trains on said line of railroad in violation of the laws of the State of Texas, in violation of their charter contract and to the great damage and injury of the State of Texas and to the public.

XXIV.

Wherefore, your complainants, the State of Texas, on behalf of its citizens and all the persons residing particularly in the section of the State of Texas served by the Eastern Texas Railroad, and C. M. Cureton, Attorney General for the State of Texas, and personally for himself representing a class as aforesaid, but without an adequate remedy at law and subject to irreparable damage and a multiplicity of suits pray:

1. That this Honorable Court may grant an interlocutory injunction during the pendency of this suit against the defendants, the United States and the Interstate Commerce Commission, the St. Louis, Southwestern Railway Company and the St. Louis, Southwestern Railway Company of Texas and the Eastern Texas Railroad Company, and each of them restraining the enforcement, operation and execution of and the order complained of and the making of any other order to the same end and purpose and setting aside in whole the report, findings and order made
39 and entered by the Interstate Commerce Commission as aforesaid attached hereto as Exhibit "A" and restraining said defendants, their officers, employees, agents and servants and successors in office and each of them from doing anything or beginning any further action or prosecution of any kind or character with the intent and purpose of carrying out or enforcing the operation and execution of said order so made by the Interstate Commerce Commission, or interfering with the enforcement of the laws or Constitution of the State of Texas. That the District Judge of this Honorable Court, upon presentation of this application for an interlocutory injunction, shall immediately call to his assistance to hear and determine this application, two other judges, of whom at least one shall be a Circuit Judge; that this Honorable Court, by an order to show cause shall give at least five days' notice of the hearing of this application of an interlocutory injunction to the Interstate Commerce Commission, to the Attorney General of the United States, the St. Louis, Southwestern Railway Company, the St. Louis, Southwestern Railway Company of Texas and the Eastern Texas Railroad Company by service of subpoena upon the Chairman of the Interstate Commerce Commission, the Attorney General and the proper officers of the railroad companies named defendants, in the manner and form made and provided by statute.

2. That the report, findings and order of the Interstate Commerce Commission herein complained of and attached as Exhibit "A" be set aside in whole and declared illegal, usurpatory and void.

3. That the several sections and subdivisions complained of herein, and particularly Subdivisions 18, 19, 20, 21 and 22 of Section 402 of the Interstate Commerce Commission Act be declared unconstitutional, null and void.

40 4. That this Honorable Court issue writs of mandamus and prohibition as warranted by the principles and usages of law to the defendants herein and to whoever else may be or become necessary or proper parties, ancillary to the jurisdiction herein invoked.

5. That this Honorable Court shall issue a writ of injunction against the defendants, the United States, the Interstate Commerce Commission, the St. Louis, Southwestern Railway Company, the St. Louis, Southwestern Railway Company of Texas, and the Eastern Texas Railroad Company and each of them perpetually restraining

the enforcement, operation and execution of and setting aside in whole the report, findings and order of the Interstate Commerce Commission hereto attached as Exhibit "A", and restraining said defendants, their officers, agents, employes and servants and successors in office and each of them from doing anything or beginning any suit, action or prosecution against the Eastern Texas Railroad Company or either of the other defendant Railroad companies, or against complainants to compel the enforcement, operation and execution of said report, findings and order or interfering with the enforcement of the laws and Constitution of the State of Texas.

Complainants also pray not only for writ of injunction conformably to the prayer, but also that a subpœna of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, the United States, the Interstate Commerce Commission, the St. Louis, Southwestern Railway Company, the St. Louis, Southwestern Railway Company of Texas and the Eastern Texas Railroad Company, commanding them and each of them on a certain day therein to be named to be and appear before this Honorable Court then and there to answer, (but not under oath, answer under oath being expressly waived) all and singular the several allegations herein made and to perform and abide
41 by such order and direction or decree as may be made in the premises *with* both upon hearing upon the application for interlocutory injunction and on the final hearing hereof, complainants' prayer being that said order, upon final hearing, be made perpetual and complainants fu-ther pray for all such relief in equity as to the Court may seem proper and necessary to meet conditions and preserve unto the State of Texas its several rights herein pleaded and for such relief prayer is ever made.

(Signed) C. M. CURETON,
THE STATE OF TEXAS
C. M. Cureton, Personally and as Attorney General of the State of Texas.
(Signed) WALLACE HAWKINS,
(Signed) TOM L. BEAUCHAMP,
Assistant Attorneys General,
Solicitors for the Complainants.

Austin, Texas.

STATE OF TEXAS,
County of Travis:

I, Tom L. Beauchamp, being duly sworn, depose and say that I am an Assistant Attorney General of the State of Texas, and one of the solicitors signing the foregoing Bill of Complaint; that I have read same and know the contents thereof; that so far as the same are allegations of fact they are true of my own knowledge and so far as they are alleged upon advice, information and belief, I believe them to be true.

(Signed) TOM L. BEAUCHAMP.

Subscribed and sworn to before me in the City of Austin, County of Travis, State of Texas, this 15 day of July, A. D. 1921.

[SEAL.] VANCE STOCKTON,
Notary Public in and for
Travis County, Texas.

42 EXHIBIT "A."

Interstate Commerce Commission.

Finance Docket No. 4.

In the Matter of Application of the EASTERN TEXAS RAILROAD COMPANY for a Certificate of Convenience and Necessity.

Submitted Sept. 27, 1920. Decided Dec. 2, 1920.

Certificate of Convenience and Necessity Issued Authorizing the Eastern Texas Railroad Company to Abandon its Line of Railway Between Lufkin, Tex., and Kennard, Tex.

E. B. Perkins, Daniel Upthegrove, E. J. Mantooth and E. B. Stroud, Jr., for Eastern Texas Railroad Company.

V. L. Brooks, S. N. Townsend, J. R. Painter, I. D. Fairchild, and Clay Stone Briggs, for Protestants.

John C. Box, for Lufkin Chamber of Commerce and Angelina County, Texas.

Report of the Commission.

Division 4, Commissioners Meyer, Daniels, Eastman, and Potter.

By DIVISION 4:

The Eastern Texas Railroad Company, hereinafter called the Eastern Texas, by petition filed June 3, 1920, seeks a certificate of convenience and necessity to permit it to abandon its line of railway in Angelina, Trinity and Houston Counties, Texas.

The Eastern Texas extends from Lufkin, Tex., in a westerly direction, 30.3 miles to Kennard, Tex., and has in addition to this main line track about 4 miles of switch yard and passing tracks.

43 At Lufkin, its tracks connect with those of the St. Louis Southwestern Railway Company of Texas, hereinafter called the Cotton Belt, the Houston, East & West Texas Railroad, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. Applicant has no other railroad connections. It maintains a joint agency with the Cotton Belt at Lufkin, has agency stations at Ratcliff, Tex., and Kennard, and has 6 sidetracks at other points where carload freight may be received or delivered. It owns 1 combination passenger, mail and express car, but no other rolling stock. It rents 1 light locomotive from the Cotton Belt, and pays per diem, under the code rules, for foreign cars while on its line. The only regular serv-

ice it maintains is 1 mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

The Eastern Texas was incorporated November 8, 1900, under the general railroad incorporation laws of Texas, to construct a railroad from Lufkin to Crockett, Tex. Its line was constructed to Kennard in 1901 and 1902, and has been continuously operated since, though it has not been extended to Crockett. The company was promoted and financed by individuals interested in the Texas, Louisiana Lumber Company, hereinafter called the lumber company, which is a subsidiary of the Central Coal & Coke Company of Kansas City, Mo. A substantial amount of applicant's right of way was donated to it by the owners of the land. It never received a land grant from the state, nor exercised the right of eminent domain. It was originally authorized to issue $150,000 capital stock, which amount was increased in 1902 to $1,000,000. Shares of stock with a par value of
$454,500, but no bonds, have been issued. On September
44 1, 1906, all outstanding stock of the Eastern Texas was acquired by the St. Louis Southwestern Railway Company, hereinafter called the Southwestern, which, except for the directors' qualifying shares, still holds it. There is substantial identity between the officers of the Eastern Texas and the Southwestern, and the two roads have twice endeavored to consolidate since the stock purchase by the latter. The Texas legislature has refused to authorize the consolidation unless the Eastern Texas would extend its line to Crockett.

Applicant's line was constructed primarily to serve the Lumber Company, which then owned 116,000 acres of pine-timber land near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tram roads through this timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value $94,604.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern Texas stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.

The Ratcliff mill ceased operation about 1917, and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.

Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows that the country it serves is largely cut-over timber land, the soil
poor, and the agricultural development very limited except in
45 the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1,200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company, is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern

Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the then abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1919 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first five months of 1920. The greatest volume of agricultural products moved since 1909 was the 6,592 tons carried in 1914. This traffic has decreased to 2,072 tons in 1919, and 1,038 tons *was* moved in the first 5 months of 1920. The tonnage of forest products,
46 from 1909 to 1917 ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 14,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income for the year ended June 30, 1920, was $34,210 and its net income $24,494.21. The corresponding figures for 1917 were $17,336.95 and $6,391.57. Its operating expenses exceeded its operating revenues by $9,699.66 in 1918, by $4,086.15 in 1919, and by $24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was $20,128.46, in 1919 it was $49,362.64, and in January and February of 1920 it was $10,484.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was $2,942.36 in 1918 and $5,041.74 in 1919. There was a deficit of $2,033.19 for March, 1920, $4,455.54 for April, 1920, $11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be $68,824.68, exclusive of large expenditures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of $32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of $100,000 for the cancellation of all of its outstanding obligations, and that the Southwestern will guarantee said bond and advance to appli-
47 cant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable, and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized, whether the indebtedness or obligation is or is

not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short line connections, and applicant contends that it would be impossible to increase its rates or divisions in amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 140 per cent under the rates in effect immediately prior to the increases authorized in Increased Rates, 1920, I. C. C. 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35-pound steel rails, which are not badly worn, but are both line and surface bent to such an extent that it is said trains cannot safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and
48 fills have fallen away, particularly at the bridge and trestle approaches, to such an extent that the ties are not properly supported. The slopes of cuts and ditches have fallen in, damaging the drainage so that, in many places, ties are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend $146,000 to $200,000 on roadways, bridges and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss.

The people of the community served by the Eastern Texas object to the granting of the certificate. It is shown that in case of abandonment of the road the nearest railway stations would be Crockett on the International and Great Northern Railway, about 17 miles from Kennard and 20 miles from Ratcliff, and Wells, Tex., on the Cotton Belt, about 20 miles northeast of Ratcliffe. The public highways in this territory are not well improved. A fair, graded, clay-and-sand road extends from Ratcliff through Kennard to Crockett, but this road becomes soft during the rainy season. Another road not as good extends from Ratcliffe through Sullivan Ferry to Wells. A road from Sullivan Ferry to Lufkin parallels the railroad for approximately 9 miles. Other roads extend from the general territory served by applicant to Morrell, Tex., and Alto, Tex., on the Cotton Belt and to Groveton, Tex., on the Groveton, Lufkin & Northern Railway. Livestock produced in the vicinity of Ratcliff and Kennard hitherto has been driven to Crockett on account of better trans-

portation facilities at that point. If the abandonment is permitted, it will be necessary to dray cotton and forest products a considerable distance to stations, but probably no further than some of the cotton produced in Texas is now hauled. Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but made no definite showing that within any reasonable time there would be sufficient tonnage to pay the
49 operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for $50,000.

Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of the applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of $50,000. A certificate and order to that effect will be issued.

Certificate of Public Convenience and Necessity.

At a Session of the Interstate Commerce Commission, Division 4, Held at its Office, in Washington, D. C., on the 2nd Day of December, A. D. 1920.

Finance Docket No. 4.

In the Matter of Application of the EASTERN TEXAS RAILROAD COMPANY for a Certificate of Convenience and Necessity.

Application No. 1 Ab-1.

Be it known, that on the third day of June, 1920, the Eastern Texas Railroad Company, a carrier subject to the Interstate Commerce Act, filed with the Interstate Commerce Commission its application for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Tex., and Kennard, Tex., situated in the Counties of Angelina, Trinity and Houston, in the State of Texas, pursuant to the provisions of paragraphs 18, 19, 20 and 21, of Section 1 of the Interstate Commerce Act;

That upon receipt of such application the Commission caused notice thereof to be given to and a copy to be filed with the Governor of the State of Texas and caused said notice to be published
50 for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operates;

That after applicant had made due return to the questionnaire showing the facts and circumstances with respect to such proposed abandonment; and after due notice to all parties in interest, a hearing was held on said application on the 19th day of July, 1920, at Austin, Tex., and on the 26th day of July, 1920, at Ratcliff, Tex., at which all parties in interest were given opportunity to appear and be heard in the premises;

That after said case was submitted, representatives were made to the Commission by the Legislature of Texas by a joint resolution with respect to the jurisdiction of this Commission in these proceedings;

That on the 2nd day of December, 1920, the Commission, by Division 4, made and filed a report containing its findings of fact and conclusions thereon which said report is hereby referred to and made a part hereof;

Now, therefore, upon the record in this proceeding,

The Interstate Commerce Commission hereby certifies, that the present public convenience and necessity permit of the abandonment of all of the lines of railroad of the Eastern Texas Railroad Company as follows, to-wit:

Between Lufkin, Tex., and Kennard, Tex., through the counties of Angelina, Trinity and Houston in the State of Texas;

It is therefore ordered, That the Eastern Texas Railroad Company be, and it is hereby authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled or removed, or as it is now situated.

51 Provided, however, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed $50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad;

Provided, further, That the Eastern Texas Railroad Company, be, and it is hereby, required to furnish to the Interstate Commerce Commission a good and sufficient bond secured by the St. Louis Southwestern Railway Company in the penal sum of $100,000, to be approved by the Secretary of the Interstate Commerce Commission, conditioned on the understanding that the said Eastern Texas Railroad Company will, before the expiration of one year after the date of this certificate, adjust, settle and pay all outstanding debts, obligations, judgments, liens, or mortgages, together with all taxes and assessments, Federal, state or municipal, due or to become due, and all claims or judgments for damages to persons or property.

Provided, further, That before suspending operation of said railroad or of any service now being rendered thereon, said Eastern Texas Railroad Company shall give at least thirty days' notice to the public of the date at which such service will be discontinued, said notice to be posted in a conspicuous manner in each station on said line of railroad; and

Provided, further, That the Eastern Texas Railroad Company when making application for cancellation of tariffs, shall refer to this certificate by title, date and docket number.

By the Commission, Division 4:

[SEAL.] GEORGE B. McGINTY,
Secretary.

52 EXHIBIT "B."

Articles of Incorporation of the Eastern Texas Railroad Company.

Know all men by these presents, that the undersigned, each being a subscriber to the stock of the railroad corporation above and hereinafter named, do hereby associate ourselves together and form ourselves into a corporation under the statutes of the State of Texas for the purpose of constructing, owning, maintaining and operating the railroad hereinafter described and to that end and for that purpose have adopted and hereby do adopt and sign the following articles of association:

1. The name of the proposed corporation is and shall be "Eastern Texas Railroad Company."

2. It is intended to construct the proposed railroad from the town of Lufkin, in Angelina County, State of Texas to the City of Crockett, in Houston County, State of Texas. There are no intermediate counties through which it is proposed to construct the same.

3. The place at which the principal business office of the proposed corporation shall be established and maintained is Kennard, Houston County, State of Texas, a place on said line of road.

4. The time of the commencement of the proposed corporation is the first day of November, 1900, and the period of the continuation of said proposed corporation is twenty-five years from and after said last named date.

5. The amount of the capital stock of the corporation is One Hundred and Fifty Thousand Dollars.

6. The names and places of residence of the several persons forming the corporation are as follows:

R. H. Keith,	Kansas City,	Missouri.	
W. C. Perry,	"	"	"
John Perry,	"	"	"
J. C. Sherwood,	"	"	"
Charles Campbell,	"	"	"
D. A. Dunn,	Crockett,	Texas.	
D. A. Nunn, Jr.	"	"	
John Morrison,	Texarkana,	"	
W. H. Carson,	"	"	
W. H. Welch,	"	"	

7. The names of the members of the first Board of Directors of the corporation are and shall be as follows: to wit:

	W. H. Carson,	Texarkana, Texas.
53	W. H. Welch,	Texarkana, "
	D. A. Nunn,	Crockett, "
	D. A. Nunn, Jr.,	Crockett, "
	R. H. Keith,	Kansas City, Missouri.
	J. C. Sherwood,	" " "
	W. C. Perry,	" " "

Each of said directors is a stockholder in said corporation, and the said W. H. Carson, W. H. Welch, D. A. Nunn and D. A. Nunn, Jr., are resident citizens of the State of Texas.

The government of said corporation and the management of its affairs shall be vested in the following named officers or persons, to wit: The Board of Directors, President, Vice-President, Secretary and Treasurer, and Superintendent or Manager to be appointed hereafter by the Board of Directors, from time to time.

8. The number of shares in the capital stock of the proposed corporation is Fifteen Hundred (1500) and the amount of face value of each of said shares is One Hundred Dollars ($100.00) being a total capital stock of one hundred and fifty thousand dollars ($150,000.00).

In witness whereof we have hereto subscribed our names this — day of October, A. D. 1900.

R. H. KEITH.
W. C. PERRY.
JNO. PERRY.
J. C. SHERWOOD.
CHAS. CAMPBELL.
W. H. CARSON.
JOHN MORRISON.
W. H. WELCH.
D. A. NUNN.
D. A. NUNN, JR.

STATE OF MISSOURI,
County of Jackson:

Before me, William Newcomb, a Notary Public duly commissioned and acting for said County and State, this day personally appeared R. H. Keith, W. C. Perry, John Perry, J. C. Sherwood and Chas. Campbell, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this the 17th day of October, 1900.

My commission expires March 19th, 1901.

WILLIAM NEWCOMB,
Notary Public.

54 *Amendment to Articles of Incorporation of Eastern Texas Railroad Company.*

Whereas it appears from the surveys made on behalf of this corporation that the line of railroad described in its charter will enter and be constructed and operated for a short distance over and across the most northern portion of Trinity County, State of Texas, and

Whereas, said Trinity County is not named in the charter of the corporation as an intermediate county through which it is proposed to construct the railroad of this corporation

Now therefore, the said charter of the Eastern Texas Railroad Company is hereby amended or changed so that the second paragraph thereof shall read as follows to wit: "2. It is intended to construct the proposed railroad from the easterly boundary of and through the City or town of Lufkin in Angelina County, State of Texas, to and into the town or city of Crockett, in Houston County, State of Texas, and through the intermediate county of Trinity, State of Texas."

In witness whereof, this amendment or change of said charter has been signed by the President and Board of Directors, and attested by the Secretary under the seal of the corporation.

R. H. KEITH,
President.
R. H. KEITH,
W. C. PERRY,
J. C. SHERWOOD,
W. H. CARSON,
W. H. WELCH,
D. A. NUNN,
D. A. NUNN, JR.,
Directors.

Attest:
W. H. WELCH. [SEAL.]
Secretary.

55 STATE OF MISSOURI,
County of Jackson:

Before me, William Newcomb a Notary Public, duly commissioned and acting for said County and State, this day personally appeared R. H. Keith, President of the Eastern Texas Railroad Company, and R. H. Keith, W. C. Perry and J. C. Sherwood, members of the Board of Directors of said railroad company, known to me to be the persons whose names are subscribed to the foregoing instrument and said R. H. Keith acknowledged to me that he executed the same as President and director of said Eastern Texas Railroad Company, and said W. C. Perry and J. C. Sherwood also severally acknowledged to me that he executed the same as a member of the Board of Directors of said railroad company for the uses and purposes therein expressed.

Given under my hand and seal of office this the 9th day of January, 1901.

My term expires Mch. 19th, 1901.

WILLIAM NEWCOMB,
Notary Public.

56 *Amendment.*

THE STATE OF TEXAS,
County of Angelina:

Know all men by these presents:

That we, W. W. Fagan, President and Director of Eastern Texas Railroad Company, E. J. Mantooth, W. M. Glenn, W. C. Perry, F. C. Fogarty, E. B. Harris and R. D. Collins, directors constituting the Board of Directors of the Eastern Texas Railroad Company, come, and in compliance with an order or resolution of the stockholders of the Eastern Texas Railroad Company, passed at a meeting called by the directors of said corporation and held at Kennard, in Houston County, Texas, at 9 o'clock a. m. on May 26th, 1902, a copy of which resolution is hereto attached and made part hereof, and amends Article 5 of the charter of the Eastern Texas Railroad Company (of date October 1900, and filed in the Secretary of State's Office November 8th, 1900), so that said article 5 constituting a part of said charter as amended shall hereafter read as follows:

The amount of the capital stock of the Eastern Texas Railroad Company is One Million Dollars; in all other respects said charter to be and remain as it was originally filed.

W. W. FAGAN,
President and Director.

Attest:
E. B. HARRIS,
Secretary of the Eastern Texas Rwy. Co.

E. J. MANTOOTH,
R. D. COLLINS,
F. C. FOGARTY,
W. M. GLENN,
E. B. HARRIS,
W. C. PERRY,
Directors.

THE STATE OF TEXAS,
County of Angelina:

Before me, M. M. Fagan, Notary Public in and for Angelina County, Texas, on this day personally appeared E. J. Mantooth, W. W. Fagan, E. B. Harris, R. D. Collins, W. W. Glenn and
57 F. C. Fogarty, personally known to me to be the persons whose names are subscribed to the foregoing instrument and each acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 30th day of June A. D. 1902.

[SEAL.]

M. M. FAGAN,
Notary Public, Angelina County, Texas.

THE STATE OF MISSOURI,
County of Jackson:

Before me, Henry C. Page, Notary Public in and for said county and State, on this day personally appeared W. C. Perry, personally known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 8th day of July, A. D. 1902.

My commission expires April 19, 1904.

[SEAL.]

HENRY C. PAGE,
Notary Public.

* * * * * * *

Meeting of the Stockholders of Eastern Texas Railroad Company Had at Kennard, Houston County, Texas, at 9 o'clock a. m. on May 26th, 1902.

The meeting was called to order by W. W. Fagan, President of the company. Thereupon, E. B. Harris, Secretary, exhibited to the meeting, the affidavit of the publishers of three newspapers, one published in Angelina County, one published in Trinity County, and one published in Houston County, Texas, these being the counties through which the line of this railroad runs, to each of which affidavits was attached a printed copy of the notice of this meeting. Said affidavits show that the time, place and purpose of this meeting was advertised in a newspaper in each county
58 through which this road runs or is intended to run, at least sixty days next preceding the day appointed for this meeting. Said affidavits and copies of notices are hereto attached. The president also exhibited evidence showing that he had given notice in writing to each stockholder by serving the same personally or by depositing the same in a post office directed to the post office address of each stockholder severally, postage prepaid, at least sixty days prior to the day appointed for this meeting. The notice delivered or mailed to each stockholder is in the form of a printed notice attached to the affidavits above referred to.

It was unanimously agreed that W. W. Fagan should act as Chairman of the meeting and that E. B. Harris should act as Secretary thereof. Thereupon it was ascertained that all the stock of the corporation was represented at the meeting as follows, to wit:

H. C. Flower, by W. C. Perry, proxy, 1,394 shares.
W. W. Fagan, in person, 100 shares.
W. C. Perry, " " One "
E. J. Mantooth, in person, one share.

R. D. Collins, in person, one share.
W. M. Glenn, in person, one share.
F. C. Fogarty, in person, one share.
E. B. Harris, in person, one share.

Said proxy, was in writing, was dated March 25th, 1902, and was filed with the Secretary.

Mr. Perry then offered the following preamble and resolution, and moved the adoption thereof:

Whereas, the capital stock of this corporation, which now amounts to one hundred and fifty thousand ($150,000.00) dollars, has been found insufficient for constructing and operating the road, and

Whereas, all existing shares of stock have been paid in full.

Now therefore, be it resolved that the capital stock of this corporation be increased from One Hundred and Fifty Thousand ($150,000.00) Dollars, its present capital, to one Million ($1,000,
59 000) Dollars that being the amount of increase required for constructing, equipping and operating the railroad of the corporation between the points mentioned in its charter, to wit: Lufkin, Angelina County, Texas, and Crockett, Houston County, Texas.

Mr. Mantooth seconded the motion to adopt the resolution, and the same having received the unanimous vote of each stockholder present, and all of the existing stock of the corporation, was by the chair declared to have been adopted.

On motion the meeting adjourned.

W. W. FAGAN,
Chairman.
E. B. HARRIS,
Secretary.

Kennard, Texas, May 31, 1902.

I, E. B. Harris, Secretary of the Eastern Texas Railroad Company do hereby certify that the foregoing page and one quarter of printed matter contains a true and correct copy of a resolution adopted by the stockholders of the Eastern Texas Railroad Company at their regular annual meeting, held at the company's general offices at Kennard, in Houston County, Texas, on the 26th day of May, 1902, to certify which, given under my hand and seal on this the 31st day of May, 1902.

E. B. HARRIS,
Secretary, Eastern Texas Railroad Company.

Sworn to and subscribed before me on this the 31st day of May, 1902.

[SEAL.]

E. J. MANTOOTH,
Notary Public.

THE STATE OF TEXAS,
County of Angelina:

I, M. M. Fagan, Notary Public in and for said county and State, do hereby certify that the foregoing two pages of what purports to be the minutes and the resolution of the stockholders of the Eastern Texas Railroad Company held at Kennard, Houston County,
60 Texas, on May 26th, 1902, is a true copy of the original resolution passed by the stockholders of the Eastern Texas Railroad Company, to certify which given under my hand and seal of office this the 1st day of July, 1902.

[SEAL.] M. M. FEAGIN,
Notary Public, Angelina County, Texas.

Certificate.

Attorney General's Office,

Austin, August 13th, 1902.

This is to certify that the amendment to articles of incorporation of the "Eastern Texas Railroad Company" were submitted to me on the 13th day of August, 1902, and that having carefully examined the same I find them in accordance with the provisions of Chapter Two, Title Ninety Four of the Revised Statutes of Texas and not in conflict with the laws of the United States or of the State of Texas.

[SEAL.] C. K. BELL,
Attorney General.

(Endorsed:) Filed for record in the office of the Secretary of State this 26th day of August, 1902. Geo. T. Keeble, Chief Clerk, Acting Secretary of State.

61 *Amendment to the Charter of the Eastern Texas Railroad Company.*

Whereas, Article 3, of the Eastern Texas Railroad Company, provides that the company shall establish and maintain its general offices at Kennard, Houston County, State of Texas, as follows: "The place at which the principal offices of the proposed corporation shall be established and maintained, is Kennard, Houston County, State of Texas," and

Whereas, said general offices of said company are now and have in the past been so established and maintained, and

Whereas, it is found that the operation of said company's railroad and the carrying on of its business from the said town of Kennard is inconvenient; that the interests of the company and the general public will be better served by changing the general offices of said company from Kennard, in Houston County, Texas, to Lufkin, in Angelina County, Texas, and thereto establish and maintain same;

Now, therefore, Article 3, of the said charter of the Eastern Texas Railroad Company be and the same is hereby amended so that said Article 3 thereof, shall read as follows:

The place at which the general offices of the Eastern Texas Railroad Company shall hereafter be established and maintained, shall be in the City of Lufkin, in Angelina County, Texas.

In witness whereof, this amendment or change of said charter has been signed by the President and Board of Directors, and attested by the Secretary under the seal of the corporation.

W. W. FAGIN,
President.
W. C. PERRY,
E. J. MANTOOTH,
W. V. BOLMAN,
R. D. COLLINS,
W. M. GLENN,
JOHN A. SARGENT,
Board of Directors.

Attest:
E. J. MANTOOTH,
Secretary.

62 THE STATE OF TEXAS,
County of Angelina:

Before me, M. M. Feagin, a Notary Public in and for Angelina County, Texas, on this day personally appeared W. W. Fagan, E. J. Mantooth, W. V. Bolman, R. D. Collins and W. M. Glenn, each personally known to me to be the persons whose names are subscribed to the foregoing instrument on the reverse side hereof, and each acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this September 30th A. D., 1902.

[SEAL.] M. M. FEAGIN,
Notary Public, Angelina County, Texas.

THE STATE OF MISSOURI,
County of Jackson:

Before me, William Newcomb, a Notary Public in and for Jackson County, Missouri, on this day personally appeared W. C. Perry and Jno. A. Sargent, both personally known to me to be the persons whose names are subscribed to the foregoing instrument on the reverse side hereof, and each acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this October 7th A. D. 1902. My commission expires March 2, 1905.

[SEAL.] WILLIAM NEWCOMB,
Notary Public, Jackson County, Missouri.

63 *Certificate.*

Attorney General's Office.

Austin, October 14th, 1902.

This is to certify that the amendment to Articles of Incorporation of the Eastern Texas Railroad Company, were submitted to me on the 14th day of October, 1902, and that having carefully examined the same I find them in accordance with the provisions of Chapter Two, Title Ninety-four of the Revised Statutes of Texas, and not in conflict with the laws of the United States or of the State of Texas.

[SEAL.]

C. K. BELL,
Attorney General.

(Endorsed:) Filed for record in the office of the Secretary of State this 14th day of October, 1902. Geo. T. Keeble, Chief Clerk, Acting Secretary of State.

63½ [Endorsed:] No. Eqty. 42. In the District Court of the United States, Eastern District of Texas. State of Texas et al. vs. The United States et al. Petition and bill of complaint. U. S. District Court. Filed September 10, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy. Attorney General of Texas, Solicitor for Plaintiffs.

64 (2.)

In the District Court of the United States for the Eastern District of Texas, Texarkana Division.

In Equity.

No. 42.

THE STATE OF TEXAS et al.

vs.

UNITED STATES et al.

In Chambers, at Texarkana, Texas, This 10th Day of September, 1921.

The attached bill was this day presented to me, and it is ordered that the same be filed, and be set for hearing in the court room of the Federal Building at Texarkana, Texas on Wednesday the 21st day of September 1921 at 10 o'clock A. M. The Clerk is directed to cause a copy of this order to be served upon each of the defendants who at said time and place may show cause why the relief prayed for should not be granted. One of the judges of the Circuit Court

of Appeals of the Fifth Circuit, and Judge Duval West, judge of the District Court of the United States of the Western District of Texas will be called to assist in the hearing of this matter.

W. L. ESTES,
Judge.

T.

[Endorsed:] (2.) Equity No. 42. State of Texas et al. vs. United States et al. Order calling judges, etc. U. S. District Court. Filed September 10, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

65 (3.)

United States District Court, Eastern District of Texas, at Texarkana.

In Equity.

No. 42.

THE STATE OF TEXAS and C. M. CURETON, Personally and as Attorney General for the State of Texas, Plaintiffs,

v.

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. MCCHORD, Balthaser H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Aitchison, Joseph B. Eastman, Mark W. Potter, John J. Esch, E. I. Lewis, and J. W. Campbell, Constituting the Interstate Commerce Commission; H. M. Daugherty, Attorney General of the United States; The Eastern Texas Railroad Company, The St. Louis Southwestern Railway Company of Texas, and The St. Louis Southwestern Railway Company, Defendants.

Motion to Dismiss as to Attorney General.

H. M. Daugherty, Attorney General of the United States, by his counsel, now comes and moves the court to dismiss the petition and bill of complaint in the above-entitled cause as to him, at the cost of the plaintiffs.

As grounds for this motion it is shown:

1. The Attorney General is neither a necessary nor proper party to the petition and bill of complaint.

66 2. No relief is prayed against the Attorney General either as an individual or as an officer of the United States.

3. The Attorney General either as an individual or as an officer of the United States, is not subject to suit and process as a defendant to the petition and bill of complaint in manner and form as herein undertaken.

Wherefore, defendant prays that his motion be sustained and the petition and bill of complaint dismissed as to him.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. J. SMITH,
United States Attorney, Eastern District of Texas.

[Endorsed:] (3.) Equity No. 42. In the United States District Court for the Eastern District of Texas. State of Texas et al. vs. The United States et al. Motion to dismiss as to Attorney General. Filed September 21, 1921. U. S. District Court. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

67 (4.)

In the United States District Court for the Eastern District of Texas, at Texarkana.

In Equity.

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA et al., Defendants.

Order.

On motion of counsel for the United States, counsel for plaintiffs consenting, it is ordered as to H. M. Daugherty, Attorney General of the United States, that the petition and bill of complaint be and the same is hereby dismissed without costs.

By the Court.

WALKER,
Circuit Judge;
ESTES,
DUVAL WEST,
District Judges.
By JUDGE WEST,
For the Court.

September 21, 1921.

[Endorsed:] (4.) Equity No. 42. In the United States District Court for the Eastern District of Texas at Texarkana. The State of Texas et al., vs. United States of America et al. Order. Filed September 21, 1921. U. S. District Court. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

68 (5.)

United States District Court, Eastern District of Texas, at Texarkana.

In Equity.

No. 42.

THE STATE OF TEXAS and C. M. CURETON, Personally and As Attorney General for the State of Texas, Plaintiffs,

v.

THE UNITED STATES and EDGAR E. CLARK, CHARLES C. McCHORD, Balthasar H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Aitchison, Joseph B. Eastman, Mark W. Potter, John J. Esch, E. I. Lewis and J. W. Campbell, Constituting the Interstate Commerce Commission; H. M. Daugherty, Attorney General of the United States; the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company of Texas, and the St. Louis Southwestern Railway Company, Defendants.

Motion of the United States to Dismiss the Petition and Bill of Complaint.

United States of America, defendant, by its counsel now comes and moves the court to dismiss the petition and bill of complaint in the above-entitled cause at the cost of the plaintiffs.

As grounds for this motion it is shown—

1. The bill of complaint is vague, indefinite, uncertain, and insufficient, in this, to wit:

69 (*a*) It does not contain a short and plain statement of the grounds upon which the jurisdiction of the court depends as prescribed by Equity Rule 25.

(*b*) It does not appear from the face of the petition and bill of complaint or otherwise that the court has jurisdiction to entertain the same at the suit of the State of Texas.

(*c*) The certificate of public convenience and necessity is not an order of the Interstate Commerce Commission within the meaning of Commerce Court Act (36 Stat. 539) or Urgent Deficiencies Act (38 Stat. 219) which provide for jurisdiction and venue of suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission.

(*d*) The petition and bill of complaint is framed on the theory that the Act to Regulate Commerce, as amended, the Transportation Act of 1920, and the certificate of public convenience and necessity made and issued by the Interstate Commerce Commission in pursuance thereof after a full hearing are all in violation of the Constitution and laws of the State of Texas, when neither the Commerce Court

Act (36 Stat. 539) nor Urgent Deficiencies Act (38 Stat. 219) provides for jurisdiction and venue of suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission as in violation of the Constitution and laws of the State of Texas.

(e) The certificate of public convenience and necessity of the Interstate Commerce Commission is directed to the Eastern Texas Railroad Company operating within the State of Texas and is not directed to the State of Texas, or either of the plaintiffs, neither of whom, by reason whereof, has any standing in this court to maintain
70 the petition or bill of complaint against the United States.

(f) There is a misjoinder of parties and alleged causes of action in that the plaintiffs seek to maintain a cause of action in the public interest against the United States of America and at the same time they seek to maintain a cause of action in the public interest against the Eastern Texas Railroad Company and other railroad companies operating in the State of Texas, and other defendants. The plaintiffs have thus confounded an attempted suit against the United States with an attempted suit against other parties.

2. The petition and bill of complaint with the exhibits attached thereto and made a part thereof is without equity on its face, and does not state any cause of action against the defendant, and the court may not grant the relief prayed or any part of the same.

3. In the absence of a certified copy of the record of the evidence and proceedings before the Interstate Commerce Commission, the presumption that the certificate of public convenience and necessity rests on substantial evidence and was regularly made is conclusive.

4. The report of the Interstate Commerce Commission and certificate of public convenience and necessity entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced in the record made by the parties, and the matters and things alleged in the petition and bill of complaint and sought to be put in issue are foreclosed by the findings of fact.

5. It appears from the petition and bill of complaint with the exhibits attached thereto and made a part thereof that the certificate of public convenience and necessity of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or sus-
71 pended was authorized by the Acts to Regulate Commerce and the Transportation Act, 1920, and that it was regularly made and issued by the Commission in a proceeding properly pending and conducted.

6. The plaintiffs have not in and by the petition and bill of complaint shown that in making the certificate of public convenience and necessity the Interstate Commerce Commission transcended the power conferred upon it by the statute or violated any right of the plaintiffs protected by the Constitution of the United States or any other right of the plaintiffs over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the petition and bill of complaint, more fully to be pointed out on the hearing hereof, defendant prays that its motion be sustained, and for such other and further action or order as may be appropriate.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
E. J. SMITH,
United States Attorney, Eastern District of Texas.

[Endorsed:] (5.) Equity No. 42. In the United States District Court for the Eastern District of Texas, at Texarkana. State of Texas et al., vs. United States et al. Motion of the United States to dismiss the petition and bill of complaint. Filed September 21, 1921. J. R. Blades, clerk. U. S. District Court, by W. R. Chalker, deputy.

72 (6.)

In the District Court of the United States for the Eastern District of Texas.

In Equity.

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,
v.
THE UNITED STATES et al., Defendants.

Motion to Dismiss.

Now comes the Interstate Commerce Commission, which for convenience will be referred to hereinafter as the Commission, one of the defendants in the above-entitled cause, and moves the court to dismiss as to it the petition and bill of complaint filed herein for the following reasons:

1. That it affirmatively appears in the petition and bill of complaint, hereinafter termed the bill of complaint, that the certificate of convenience and necessity, set out in Exhibit A thereof, made by the Commission on December 2, 1920, is not an order of the Commission within the meaning of section 1 of an act approved June 18, 1910, 36 Stat., 539, and of the subdivision headed "Judicial" of an act approved October 22, 1913, 38 Stat., 208, 219, under which plaintiffs seek to maintain this suit.

2. That the said bill of complaint does not state a cause of action entitling the plaintiff to the relief, or any part thereof, prayed for in said bill of complaint.

INTERSTATE COMMERCE COMMISSION,
By WALTER McFARLAND,
Counsel.

P. J. FARRELL, *Of Counsel.*

73 *Answer of the Interstate Commerce Commission.*

Without waiving its objection to the sufficiency of the bill of complaint, and now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in said bill of complaint, the Commission, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Answering paragraphs I to XXIII, inclusive, of the bill of complaint, this defendant, which for convenience will be referred to hereinafter as the Commission, admits that an application for a certificate of convenience and necessity authorizing it to abandon its lines of railway between Lufkin, Tex., and Kennard, Tex., was filed with the Commission by the Eastern Texas Railroad Company on June 3, 1920, and was docketed as Finance Docket No. 4, as alleged in the bill of complaint; that thereupon the Commission instituted a proceeding of investigation into the matters presented by the application; that the Commission caused notice of the application to be given to and a copy to be filed with the Governor of the state of Texas and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operated; that the case was duly heard; that briefs were filed on behalf of the interested parties; that the case was argued before the Commission; and that the Commission made a report and certificate of convenience and necessity in the premises on December 2, 1920, which, with the exception of certain immaterial typographical errors, is as set forth in Exhibit A of the bill of complaint.

74 The Commission alleges that the findings made in said report and certificate of December 2, 1920, were, and are, and that each of them was, and is, fully supported and justified by the record before the Commission in that proceeding.

The Commission further alleges that in making said report, findings and certificate it considered and weighed carefully in the light of its own knowledge and experience every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by allegations in the bill of complaint in this suit.

The Commission further alleges that said report, findings and certificate were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making them it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and that the Commission denies each of, and all, the allegations to the contrary contained in said bill of complaint.

II.

Except as herein expressly admitted, the Commission denies the truth of each of, and all, the allegations contained in the bill of complaint herein, in so far as they conflict either with allegations in this answer, or with either the statements or conclusions of fact included in the Commission's said report and certificate, which are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove, as this honorable court shall direct, and therefore prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By WALTER McFARLAND,
Counsel.

P. J. FARRELL,
Of Counsel.

75 CITY OF WASHINGTON,
District of Columbia, ss:

B. H. Meyer, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named defendant, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

B. H. MEYER.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 17th day of September 1921.

[SEAL.] ALFRED HOLMEAD,
Notary Public.

[Endorsed:] (6.) Equity No. 42. In the District Court of the United States for the Eastern District of Texas. Motion to Dismiss. State of Texas et al. vs. United States et al. Filed September 21, 1921. U. S. District Court. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

76

(7.)

In the District Court of the United States for the Eastern District of Texas, at Texarkana.

In Equity.

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,

vs.

THE UNITED STATES et al., Defendants.

Motion to Dismiss.

Now come St. Louis Southwestern Railway Company, St. Louis Southwestern Railway Company of Texas, and the Eastern Texas Railroad Company, and move the court to dismiss as to each of said defendants the petition and bill of complaint filed herein, for the following reasons, to-wit:

1.

Because it affirmatively appears in said petition and bill of complaint that this is a suit to set aside an order of the Interstate Commerce Commission granting the Eastern Texas Railroad Company authority to abandon its line of railroad, and that the United States is the only necessary or proper party defendant to said suit, and that neither the said St. Louis Southwestern Railway Company, the St. Louis Southwestern Railway Company of Texas, nor the Eastern Texas Railroad Company are necessary or proper parties thereto.

2.

Because it affirmatively appears in said petition and bill of complaint, that this is a suit to set aside an order of the Interstate Commerce Commission as hereinabove alleged, and that the plaintiff in said petition and bill of complaint seeks to join therewith a cause of action for the breach of an alleged contract between the plaintiff, State of Texas, and the said Eastern Texas Railroad Company, and further seeks to have adjudicated the question as to whether or not there has been a consolidation between the said defendants, which said alleged cause of action can not be joined with the said action to set aside the order of the Interstate Commerce Commission.

77

3.

Because said petition and bill of complaint does not state any causes of action against the said defendants, or either of them, or that plaintiff is entitled to the relief, or any part thereof, as prayed for in said bill of complaint.

Wherefore, said defendants and each of them pray that an order be entered dismissing said defendants and each of them as parties defendant to this suit.

Respectfully submitted,

(Signed) E. B. PERKINS,
DANIEL UPTHEGROVE,
KING, MAHAFFEY, WHEELER,
E. J. MANTOOTH,
Solicitors for Defendants.

78 United States District Court, Eastern District of Texas.

In Equity.

No. 42.

THE STATE OF TEXAS et al., Plaintiffs,

vs.

THE UNITED STATES et al., Defendants.

Final Order.

This cause came on to be heard and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to-wit:

1. That the motion filed by the United States to dismiss the petition and bill of complaint be and the same is hereby sustained, and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there in open court, objected and excepted.

2. That the motion filed by the Inter-State Commerce Commission to dismiss the petition and bill of complaint be and the same is hereby sustained, and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there, in open court, objected and excepted.

3. And thereupon, in open court, the plaintiffs, by their counsel, prayed an appeal to the Supreme Court of the United States from

the foregoing final order, which appeal was in open court allowed as prayed.

By the Court:

(Signed) R. W. WALKER,
Circuit Judge.
W. L. ESTES,
DUVAL WEST,
District Judges.

[Endorsed:] 8. Equity No. 42. United States District Court for the Eastern District of Texas. State of Texas et al. vs. United States et al. Final order. U. S. District Court. Filed September 21, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

79 (9.)

In Equity.

No. 42.

THE STATE OF TEXAS et al.

vs.

THE UNITED STATES et al.

Assignments of Error.

Now come the Plaintiffs herein and file the following Assignments of Error upon which they will rely upon their prosecution of this appeal, from the order of the court granting the motion of the defendants to dismiss plaintiffs' bill, made and entered herein on the 21st day of September, A. D. 1921.

1.

That there is manifest error on the face of the record in that the court erred in holding there was no equity in plaintiffs' bill.

2.

There was manifest error on the face of the record in that there were other parties defendant than the United States and the Interstate Commerce Commission, to wit: The St. Louis Southwestern Railway Company, the St. Louis Southwestern Railway Company of Texas and the Eastern Texas Railway Company, and the bill against them should not have been dismissed on the motion of the United States and the Interstate Commerce Commission.

3.

That there is error in the court's ruling because plaintiffs — thereby denied the right to attack the order of the Interstate Commerce Commission in the manner prescribed by law.

Wherefore, appellants pray that said decree be reversed and that said District Court for the Eastern District of Texas be
80 ordered and directed to re-instate plaintiffs' bill and hear same on its merits.

C. M. CURETON,
Attorney General;
WALACE HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorneys General,
Solicitors for Plaintiffs.

[Endorsed:] (9.) Eq. 42. Assignment of Errors. United States District Court, Eastern District of Texas. State of Texas et al. v. United States et al. U. S. District Court. Filed September 21, 1921. J. R. Blades, Clerk, by W. R. Chalker, Deputy.

81 *Clerk's Certificate.*

I, J. R. Blades, Clerk of the United States District Court for the Eastern District of Texas, in the Fifth Circuit, do hereby certify that the above and foregoing is a full, true and complete transcript of record, assignment of error and all proceedings in cause No. 42, in Equity, wherein the State of Texas et al. are plaintiffs and the United States et al. are defendants, as fully as same remains on file and of record in my office at Texarkana.

Witness, my hand officially and the seal of said court, at Texarkana, Texas, this the 22nd day of September, A. D. 1921.

[Seal of United States District Court, Eastern District of Texas.]

J. R. BLADES,
Clerk.
By W. R. CHALKER,
Deputy.

Endorsed on cover: File No. 28,518. E. Texas D. C. U. S. Term No. 563. The State of Texas and C. M. Cureton, personally and as attorney general for the State of Texas, appellants, vs. The United States of America, Charles C. McChord et al., constituting the Interstate Commerce Commission, et al. Filed October 3d, 1921. File No. 28,518.

No.....

In the Supreme Court of the United States

OCTOBER TERM, 1921

THE STATE OF TEXAS ET AL.

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS FROM AN ORDER REFUSING AN INTERLOCUTORY INJUNCTION SUSPENDING AND RESTRAINING THE ENFORCEMENT OF AN ORDER MADE BY THE INTERSTATE COMMERCE COMMISSION AND DISMISSING PLAINTIFF'S BILL.

Motion to Advance Hearing.

Now comes the State of Texas and C. M. Cureton, its Attorney General, acting in his official capacity and as a citizen of the State of Texas, appellants in the above styled cause, and move the court to advance the setting of said cause and hear argument herein at the same time argument is heard in the case of The State of Texas, Appellant, vs. Eastern Texas Railroad Company et al., No. 298, for the October term, 1921, and for cause appellants submit:

(1) The matters at issue in the two cases are similar and relate to the identical subject matter.

(2) Cause No. 298, hereinafter referred to as the Eastern Texas Case, was appealed from the District Court for the Western District of Texas from an order dissolving a temporary injunction and finding against appellant on the law and precluding the introduction of testimony. Said cause was by this honorable court assigned for argument for October 10, 1921, upon the granting of a temporary restraining order compelling appellees to keep the property in question in status quo pending appeal. Thereafter the State of Texas filed proceeding in the District Court for the Eastern District of Texas in accordance with the Act of October 22, 1913, known as the "District Court Act" for the purpose of suspending and setting aside an order of the Interstate Commerce Commission, dated December 2, 1920, denominated a certificate

of public convenience and necessity authorizing the Eastern Texas Railroad Company to abandon operation of its main line and dismantle and remove its tracks and dispose of its physical properties.

In the Eastern Texas case, the State of Texas had brought suit and obtained an injunction in a district court of Texas to restrain the Eastern Texas Railroad Company and its officers, under the laws of the State of Texas, from abandoning operation and, thereafter, upon the issuance of the certificate referred to by the Interstate Commerce Commission, the cause was transferred to the Federal court for the Western District of Texas, where, upon motion of the defendant railroad company, the restraining order granted by the State court was dissolved on the ground that the order of the Interstate Commerce Commission, directing the abandonment of the railroad, was mandatory and had superseded the laws of the State of Texas, being the order complained of on appeal.

Upon the hearing of plaintiff's application for interlocutory injunction in the case of The State of Texas vs. United States et al., before Circuit Judge Walker and District Judges Estes and West at Texarkana, in the Eastern District of Texas on the 21st day of September, 1921, the United States was represented by the Department of Justice and the Interstate Commerce Commission by its counsel, who appeared and moved the dismissal of the bill on the ground that there is no equity in it and, in presenting said motion, concurred in the views of the State of Texas in the case formerly appealed from the Western District of Texas above referred to in the construction of the statute giving the Interstate Commerce Commission directions to issue certificates of convenience and necessity authorizing the abandonment of railroads and thereby acknowledged that said certificate of convenience and necessity as to abandonments was and is only a permissive order and not directory; that by reason of its nature, no harm was done to plaintiffs and injunction to restrain the order would not lie. Two other defendants, the St. Louis Southwestern Railway Company and the St. Louis Southwestern Railway Company of Texas also filed motion to dismiss the plaintiff's bill on the ground that

the suit was brought to set aside an order of the Interstate Commerce Commission granting the authority to the Eastern Texas Railroad Company to abandon its line of railroad, and that neither of said defendants were parties to said order and neither are necessary or proper parties to said suit. The court, as thus constituted, granted the motion of the United States, of the Interstate Commerce Commission and of the defendant railroads dismissing plaintiff's bill. From this order appeal was taken.

Thus it was held that the order and certificate authorizing the abandonment of the Eastern Texas Railroad was only permissive and not mandatory, a view contrary to that held by the judge of the Western District of Texas in the Eastern Texas case, being No. 298, October term, 1921.

(3) The parties to each cause are not identical, yet all parties to the Eastern Texas case, except the officers of the company, are also parties to this suit, and the decision in one case will determine the issues in the other and the hearing of argument on both cases at the same time is necessary to a complete understanding and discussion of all the issues involved and will eliminate the time and expense of two hearings to the advantage of the court and of the litigants.

Wherefore, appellants pray this court to grant a proper order fixing argument in both causes at the same time, either by advancing the last case appealed or postponing the argument in the first case as to the court may seem proper, and in this connection appellants suggest advancement for hearing of the case of the State of Texas vs. United States, the last on appeal.

STATE OF TEXAS,
C. M. CURETON,
Attorney General.
By C. M. CURETON,
Attorney General.
WALACE HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorneys General,
Solicitors for Appellant.

STATE OF TEXAS,
COUNTY OF TRAVIS.

Tom L. Beauchamp, being duly sworn, deposes and says that he is one of the solicitors for the appellants named in the foregoing motion and is familiar with the facts therein set forth; and affiant further states that the facts stated in the foregoing application are true as therein stated.

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Subscribed and sworn to before me on this the first day of October, A. D. 1921.

VANCE STOCKTON,
Notary Public in and for Travis County, Texas.

We, the undersigned, as attorneys for appellees, acknowledge service of the foregoing motion and agree to the granting of the motion and ask that the two causes named be argued at the same time.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE STATE OF TEXAS ET AL.
v.
THE UNITED STATES OF AMERICA ET AL. | No. 563.

APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS.

SUGGESTIONS ON APPELLANTS' MOTION TO ADVANCE.

On October 3, 1921, the transcript was filed with the clerk of this court, obviously too late for the appeal to be argued with No. 298, *The State of Texas* v. *Eastern Texas Railroad Company et al.*, fixed for October 10, 1921, to which the United States is not, and never was, a party. Nevertheless, as the suit in the district court in the instant case was styled a suit to set aside an order of the Interstate Commerce Commission, the hearing on the appeal is entitled to priority over other cases (Commerce Court act, 36 Stat. 539, 542; urgent deficiencies act, 38 Stat. 219, 220).

The Solicitor General concurs in that part of the closing paragraph of the motion to advance filed by counsel for appellants which suggests that the

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argument in No. 298, *supra*, be postponed to a later date and that the argument in the instant case be advanced to the same date, to the end that the two appeals may be argued together.

JAMES M. BECK,
Solicitor General.

OCTOBER, 1921.